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The twenty-third annual meeting of the American Bar Association will be held at Saratoga Springs, New York, on August 29th, 30th and 31st. In addition to the sessions of the association, there will be meetings of the Section of Legal Education, and of representatives of law schools, called by invitation of the Section of Legal Education. The programme of the sessions of the association includes the address of the president, Charles F. Manderson, the annual address by Geo. R Peck, papers by Richard M. Venable, on "The Growth of the Law," by Edward Avery Harriman on "Ultra Vires Corporation Leases," and by John Bassett Moore on "A Hundred Years of American Diplomacy."

Judge Townsend, of the United States Circuit Court for the District of New York, has rendered a decision on the *status* of Porto Rico, which is contrary to that recently handed down by United States Judge Lochren, of which we made mention some time ago. (50 Cent. L. J. 461.) The case arose from the levying of duties by the collector of New York on tobacco imported from Porto Rico in June, 1899 At that time congress had not legislated for Porto Rico, and it was under military government. Judge Townsend holds that as it was a foreign country before the war with Spain, it did not cease to be such because of our military occupation. He says that the cession of Porto Rico to the United States by Spain did not incorporate the inhabitants within the United States. They were obliged to await the action of congress before knowing the character of their citizenship. "Since congress," he declares, "at the time of this importation, had not performed this condition of incorporation, the *status* of Porto Rico, except as to other nations, remained unchanged." This conclusion Judge Townsend defends by declaring that it would be a narrow construction of the constitution which "would find in some underlying principle a veto upon an attempt to act for the highest interest of our nation and the people intrusted to its care." In the brief synopsis of the opinion of Judge Townsend now before us no authorities are cited, and therefore it cannot be determined how the precedents on which Judge Lochren relied are disposed of.

The Supreme Court of Wisconsin has recently, in the case of Eau Claire Nat. Bank v. Benson, had before it a question which has been a more or less perplexing one to others of the State tribunals, and that is the construction of statutes of other States involving the liability of stockholders in corporations, and particularly with regard to those termed "self-executing." After much apparent thought and labor the court, in an exhaustive and learned opinion, reached substantially the following conclusions: When a statute, requiring judicial construction, has received it by the highest court having jurisdiction in that regard, and such construction has been firmly established as correct, it is as much a part of the statute as if plainly written into it originally, and the court may properly decline to consider, thereafter, the subject of whether such construction was right or wrong. The constitutional or statutory liability of stockholders of a corporation to its creditors, created by the laws of the State of Minnesota, must be construed here as of the same nature as that given thereto by the highest court of such State. It having been determined by the Supreme Court of Minnesota, that the constitutional liability of stockholders of a Minnesota banking corporation is of such a nature that it cannot be enforced by an action at law by one or any number of creditors against one or any number of stockholders, this court is bound thereby. The term "self-executing," as applied to a constitutional or statutory provision in regard to an added liability of stockholders of a corporation to its creditors, has reference only to whether such a provision is enforceable without any specific remedy therefor given by the written law. If a constitutional or statutory provision, regarding an added liability of stockholders of a corporation to its creditors, be self-executing, yet its nature be such that it cannot be enforced otherwise than by an action in equity in favor of all the creditors against all the stockholders, brought in the home jurisdiction where the corporation can be reached, it cannot be otherwise enforced either in the

home or any other jurisdiction. Judicial authorities in a State, regarding the added liability of stockholders under its laws, to the effect that it is enforceable at law by a single creditor against a single stockholder as an ordinary debt of the latter to the former, and authorities to the effect that such liability can be enforced in any jurisdiction where service can be obtained upon any stockholder, have no application whatever to a liability of a stockholder construed by the highest tribunal of the State where it was created as one not enforceable except by an action in equity in favor of all the creditors of the corporation desiring to participate therein, against all the stockholders within the jurisdiction of the court.

NOTES OF IMPORTANT DECISIONS.

CHATTEL MORTGAGE—MORTGAGEE'S KNOWLEDGE OF MORTGAGOR'S FRAUD.—In Browning v. De Ford, 20 Sup. Ct. Rep. 876, decided by the United States Supreme Court, it was held that proof that the agent of the mortgagees of chattels was a lawyer of long standing and considerable practice, and that a debt to himself which had been already partially paid was secured by the mortgage, and that he was the son-in-law of the head of the firm which gave the mortgage, and who had previously given deeds to members of his family, one of them being to the lawyer's wife, which deeds had been long withheld from record, and that the mortgagors were merchants, constantly buying and replenishing their stock, and standing in need of credit, is sufficient to go to the jury on the question of his connection with the scheme of the mortgagors to execute the mortgage for the purpose of defrauding their unsecured creditors. It was further held that a chattel mortgage taken by an antecedent creditor, who knows that the debtor has procured the goods fraudulently, cannot be sustained against defrauded vendors of the property, whether they elect to rescind the sale and replevin the goods or to sue for the purchase price and attach the goods. The court said in part:

"In the cases relied upon by the plaintiff, but one (Stokes v. Burns, 132 Mo. 214, 33 S. W. Rep. 460) is in point. In that case it was held that where defendants procured goods by fraud, and transferred the same in trust for a bank, to secure a *bona fide* indebtedness, the mere knowledge of the bank that the goods were so procured, and that the defendants intended to defraud their other creditors, is not sufficient to avoid the trust deed at the suit of a creditor, who did not seek to disaffirm the sale of property by him to defendants. The suit was by attachment for the recovery of an amount for flour sold by plaintiff to the defendants, under which the sheriff seized certain property. The grantee under the deed of trust filed an interplea, claiming the property so seized under his deed. The court held that the plaintiff, by suing upon his account, waived the fraud in the sale, and treated it thereby as the property of the defendants, with the same power of disposition in the defendants over it as of any other property owned by them. It was said: 'If the debts secured by the deed of trust were honest debts, and the property conveyed was not excessive, and no collusive agreement shown between the defendants and the bank and Ayr Lawn Company or the trustees in the deed of trust * * * for the use of the defendants, the deed of trust must be maintained, and there was nothing to submit to the jury. No proof was offered or claim made at the trial that any part of the property conveyed by the deed of trust was, by agreement between defendants and the beneficiaries, to be held for the use of defendants. The proof of fraud on the part of defendants in procuring the property would have no tendency to prove such a result. If the debt secured was honest, the dishonest methods of defendants in gathering to themselves the property, and the knowledge of that fact by the beneficiaries, together with a knowledge of defendants' intention to defraud their other creditors in making the deed, all would not invalidate the deed or make availing to plaintiff the property thus conveyed in his character of suit.' It was admitted in the case that the plaintiff had an election of remedies, but it was said that 'the action of plaintiff in that case was based upon a contract of sale, and was a confirmation of it and a waiver of all fraud involved in it, so far as the rights of the intervening interpleader are concerned in the contest for the property. The sole inquiry, then, was as to the alleged fraudulent disposition of the property by the deed of trust to the interpleader, with the burden of its establishment upon the plaintiff.'

"We are unable to accept this view of the law. We think it makes no difference as to the rights of the mortgagee whether the action be in replevin or *assumpsit*. In either case the mortgagee can hold them if he be a *bona fide* purchaser, without notice, but not otherwise. If the attaching creditors rescind the sale and sue in replevin, the mortgagees, having knowledge of the fraudulent purchase, are in the position of taking a mortgage upon property to which they knew the mortgagor had no title. If, upon the other hand, the creditors proceed by attachment, the mortgagees, knowing that the goods were fraudulently purchased, stand in the position of taking advantage themselves of the debtor's fraud and obtaining a preference to which they are not justly entitled. If, as the evidence had some tendency to show, they actively participated in the fraud, their position is even worse.

"It is consonant neither with good morals nor

sound sense to hold that one may take a mortgage upon the property of another, which he knows to have been fraudulently acquired, and to which the purchaser has no valid title, whether the vendor elect to pursue the purchaser by a retaking of the property, or by an action for the price and an attachment of the property to secure the debt. Whichever remedy be pursued, the fact remains that, at the time the mortgage was taken, the mortgagor had a voidable title to the property mortgaged; and while an election to sue in *assumpsit* recognizes this title as between him and the vendor, such recognition does not rebound to the validity of the mortgage, which must be judged of by the circumstances under which it was taken. In other words, the suit in *assumpsit* affirms the title of the vendee, but not the title of his mortgagee.

"It is at least open to doubt whether, if the mortgagees had disposed of these goods, an action might not have lain against them for their value, upon the same principle that supports an action, where the seller is induced by fraudulent representations to sell goods to an insolvent third person, from whom the misrepresenting third person afterwards obtains them. An action lies on the assumption either of a fraudulent conspiracy rendering such participant liable, or upon the ground that the nominal purchaser was only a secret agent for the misrepresenting party, who finally bought the goods. Biddle v. Levy, 1 Stark. 20; Hill v. Perrott, 3 Taunt. 274; Phelan v. Crosby, 2 Gill, 462; State use of Steinberger v. Schulein, 45 Mo. 521, 2 Schouler, Pers. Prop. sec. 612; Benjamin, Sales (4th Ed.), sec. 445.

"The other cases cited by the plaintiffs are not in point. In O'Donald v. Constant, 82 Ind. 212, the evidence showed that the debtor who purchased the goods fraudulently turned them over to certain preferred creditors, who had no knowledge of the fraudulent purchases. The case of Bach v. Tuch, 126 N. Y. 53, 26 N. E. Rep. 1019, merely holds that a suit for the price brought with knowledge of the fraud was a ratification of the sale, and estopped the vendor from rescinding it and suing in replevin. The cases of First National Bank v. McKinney, 47 Neb. 149, 66 N. W. Rep. 280, and Thomason v. Lewis, 103 Ala. 426, 15 South. Rep. 830, are to the same effect."

RAILROAD COMPANY—NEGLIGENCE—STREET RAILWAY — LIABILITY FOR FURTHER INJURY CAUSED BY PHYSICIAN.—In Pearl v. West End St. Ry., 57 N. E. Rep. 339, decided by the Supreme Judicial Court of Massachusetts, it was held that where plaintiff was injured in an accident on a street railway, and had brought suit for the injury, and the company sent a doctor to examine him, and he directed plaintiff, who claimed he could not stand on his left leg, to try and stand on it, and in the effort to do so plaintiff fell, from the effect of which he became subject to hysterical trouble, the company was not liable for the injury occasioned thereby, since the physician in making the examination was an independent contractor, distinctly free from the control or direction of his employer. The court said in part:

"This is an action seeking to charge the defendant with the alleged results of a doctor's examination of the plaintiff. The plaintiff had had an accident, and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him. The plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg. The plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg. The examining doctor then told the plaintiff to 'try standing on his left leg.' The plaintiff tried it, fell, and attributes subsequent hysterical trouble to this cause. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

"It would be a strong thing to say that the evidence warranted finding any one responsible for the accident except the plaintiff himself. The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself in the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest, and who had no authority of any kind. Furthermore, it recognized in its very words that perhaps the plaintiff was right in thinking that he could not stand in that way. It only called on him for an experiment in a region of admitted doubt. How far the experiment should go necessarily was left to the plaintiff himself when he should make it. If he carried it too far, the doctor was not to blame. See Latter v. Braddell, 50 Law J. C. P. 166, a much stronger case than the present.

"But, further, the doctor was not an agent or servant of the defendant in making his examination. He was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer. See Linton v. Smith, 8 Gray, 147; Milligan v. Wedge, 12 Adol. & E. 737, 741, 742. In this case the doctor was informing himself, according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than his profession and his purpose, that what he should do and how he should do it was left wholly to him. See Glavin v. Hospital, 12 R. I. 411, 424; Secord v. Railway Co. (C. C.), 18 Fed. Rep. 221, 225.

"An argument is addressed to us drawn from the liability of litigant for his attorney. Shattuck v. Bill, 142 Mass. 56, 7 N. E. Rep. 39. But no argument can be trusted that relies on that analogy. Perhaps the liability for an attorney rests on the fact that the very essence of his employment was to represent the person of a party to a suit. '*Attornatus fere in omnibus personam domini representat.*' Bract., 342a. It must be re-

membered that this right of representation in a lawsuit was conceived with difficulty, and only gradually granted, and, as first allowed, seems to have been worked out through some sort of fictitious identification.

"Whether for that reason or another, attorneys sometimes have been spoken of as servants. (Anon., 1 Mod. 209, 210), and their acts within the scope of their employment always have been said to be the acts of their clients. Parsons v. Loyd, 3 Wils. 341, 345; Barker v. Braham, 2 W. Bl. 866, 868, 869, 3 Wils. 368, 374; Bates v. Pilling, 6 Barn. & C. 38, 41; Newberry v. Lee, 3 Hill, 523; McAvoy v. Wright, 137 Mass. 207. In short, the liability of client for attorney is the result of a special series of events, and cannot be allowed to found a general rule."

WAREHOUSEMEN—BAILMENT OR SALE—STORAGE AND LOSS OF GRAIN.—In McGrew v. Thayer, 57 N. E. Rep. 262, decided by the Appellate Court of Indiana, it appeared that the owner of grain delivered it to a warehouseman under a written agreement reciting the receipt of the grain and the warehouseman's agreement to pay the market price per bushel at any time up to a designated date, and that it was held subject to the owner's risk of loss by fire. The grain was placed in bins, and mixed with grain of like quality belonging to other persons. The warehouseman sold grain from such bins, but at all times had on hand a sufficient quantity of grain of like quality to redeliver to the depositors the quantity deposited by them. It was held that the transaction constituted a bailment, and not a sale, and that the warehouseman was not liable for the market price when not demanded until after loss by fire. The court said in part:

"The main question for decision is, do the facts specially found show a contract of bailment or a contract of sale? If the former, then the conclusions of law are correct. It is earnestly argued by appellant that the facts show a sale and not a bailment. This argument is based on that clause in the receipts which read: 'For which we agree to pay the market price per bushel at any time up to July 1, 1895.' In connection with other provisions of the receipt, it is not difficult to put a construction upon this one. By this provision a time limit was given appellant by which he could, at any time within the limit (July 1, 1895), demand of appellees payment for the grain at the market price at the time of the demand. Up to that time appellees could not have compelled appellant to accept from them the market price without his consent. In other words, the appellees had no right to purchase the grain at the market price without the assent of the appellant, and the special findings fail to show any such sale was ever made, or any market price ever agreed upon. The special findings failing to show this, and this fact being essential to appellant's right to recover, the fact must be regarded as having been found against him. The rule is firmly established in this State, that, when a special finding is silent upon a material fact to be found, it is taken as a finding against the party having the burden of proving such fact. Insurance Co. v. Bowser, 20 Ind. App. 557, 50 N. E. Rep. 86; Relander v. State, 149 Ind. 243, 49 N. E. Rep. 30; Levi v. Allen, 15 Ind. App. 38, 43 N. E. Rep. 571; Wysong v. Nealis, 13 Ind. App. 165, 41 N. E. Rep. 388; Insurance Co. v. Rundell, 7 Ind. App. 426, 34 N. E. Rep. 538; Heiney v. Lontz, 147 Ind. 417, 46 N. E. Rep. 665; Archibald v. Long, 144 Ind. 451, 43 N. E. Rep. 439; City of New Albany v. Endres, 143 Ind. 192, 42 N. E. Rep. 683; Belshaw v. Chitwood, 141 Ind. 377, 40 N. E. Rep. 908; Bell v. Corbin, 136 Ind. 269, 36 N. E. Rep. 23.

"From this we have no doubt but what the receipts show a contract of bailment, subject only to appellant's right at any time up to July 1, 1895, to demand of and receive from appellees the market price of the grain at the time of the demand. The title to the grain remained in appellant, and it is shown that it was stored in regular storage bins, mixed with other grain of like quality, and that appellant knew this. It is also shown that from the time the grain was stored up to the time of the fire appellees kept on hand and in store grain of like character and quality to have delivered to appellant the full amounts so stored by him, and to have done the same with all other persons who had grain stored with them. This brings the case within the rule declared in the case of Drudge v. Leiter, 18 Ind. App. 694, 39 N. E. Rep. 34. If there was any doubt about the construction which we have thus given the receipts in question, such doubt is made to disappear in the last clause of the receipts, which is as follows: 'Subject to owner's risk of loss by fire or heating.' This clause specially fixes the ownership of the grain as in appellant, and, in case of loss by fire, the loss should be that of the owner. The rule is that when property in the custody of a bailee is destroyed accidentally, without any fault on his part, the bailee is not liable. Drudge v. Leiter, *supra*, and authorities there cited. It is the law of this jurisdiction, as well as of many others, that where a warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle, from which sales are made, the warehouseman keeping constantly on hand grain of like kind and quality for the depositor and ready for delivery to him on call, the contract is one of bailment and not of sale. Woodward v. Seamans, 125 Ind. 330, 25 N. E. Rep. 444; Rice v. Nixon, 97 Ind. 97; Bottenberg v. Nixon, 97 Ind. 106; Schindler v. Westover, 99 Ind. 395; Lyon v. Lenor, 106 Ind. 567, 7 N. E. Rep. 311; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. Rep. 585; Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. Rep. 503; Baker v. Born, 17 Ind. App. 422, 46 N. E. Rep. 930. The facts specially found bring this case squarely within the above rule. Upon the facts found, the conclusions of law are correct."

THE REGULATION OF TRUSTS.

No Need of a Constitutional Amendment.—The problem of controlling trusts, as combinations are called, is one engaging the attention of the American people, and is one of vast and far-reaching importance. The States, so far as the subject has been treated, have successfully met the trusts and regulated them. Congress has also, as to interstate trusts, successfully regulated them under the Act of July 2, 1890.[1] And in both cases of State and national legislation, the laws have proved sufficient and efficient when executed by the legal representatives of the government. The failures have been in the want of executive ability of the proper officers. That being the case, there can be no necessity for an amendment to the United States constitution. The solution of this vital question is not in amending the constitution, but in enforcing the laws already upon the statute books. It is claimed that by amending the constitution and giving congress power to regulate all trusts and combinations, both State and interstate, the problem will be easily solved; that is, inaugurate paternalism, or, in other words, centralize the power in the national government and oust the States of their sovereignty in the matter. To amend the constitution, with the regulation of trusts in view, would be dangerous. Every constitutional lawyer knows the constitution is violated as it is, and to add another amendment would only make the matter worse. The whole people wanted Representative Roberts expelled from congress, but every constitutional lawyer knows that he was rejected under the rule of precedent and not under the constitution. And so it is that congress oftentimes acts without the warrant of the constitution, if not in direct violation of its provisions.

Regulation of Interstate Combinations.—First the subject of interstate industrial combinations will be considered. Of course the States may control their internal affairs, but cannot interfere with interstate and international commerce. It is difficult to define and delimit interstate commerce, in order to set apart the legitimate province to the State and to the United States. Whatever is interstate belongs to congress. That commerce which belongs to congress to regulate is within the jurisdiction of the United States government, and that which does not belong to congress is within the jurisdiction of the police power of the State.[2] The power to deal with monopolies directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. So in contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities and articles bought and sold or exchanged to be put in the way of transit may be regulated by congress, because they form part of interstate trade and commerce. The Act of July 2, 1890, was enacted to protect trade and commerce against unlawful restraint and monopolies. While this statute prohibits all combinations in the form of trusts or otherwise, the limit is not confined to that form alone. All combinations which are in restraint of trade or commerce are prohibited whether in the form of trusts or in any other form whatever.[3] This act pronounces every contract or combination in restraint of trade or commerce among the States, which includes all contracts in restraint of trade or commerce, and not only those which are unreasonable, and it applies to that commerce which is carried on among the States, whether it be State legislation or private contracts between individuals or corporations.

Private Contracts.—The word "liberty," as used in the constitution, does not include the right of the individual to enter into private contracts upon all subjects, no matter what their nature, and wholly irrespective of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of the act of congress upon that subject. The federal constitution does not exclude congress from legislating with regard to contracts of private individuals while in the exercise of its constitutional rights to regulate commerce among the States. The power of congress to regulate interstate commerce comprises the right to enact a law prohibiting citizens from entering into those private contracts which directly and substantially, but not merely indirectly, remotely, incidentally, and collaterally, regulate to a

[1] 26 Stat. 209.

[2] Gibbons v. Ogden, 9 Wheat. 1; Leisy v. Hardin, 135 U. S. 100; *In re* Raher, 140 U. S. 545.

[3] United States v. Freight Association, 166 U. S. 290.

greater or less degree of commerce among the States. Undoubtedly the chief cause for granting to congress the sole power to regulate interstate commerce was to prevent unfriendly legislation of the several States; yet there is no limitation of that power of congress that excludes from legislating on the subject and prohibiting those private contracts which will directly and substantially regulate interstate commerce. The constitutional provision as to the liberty of the individual does not limit the extent of the power of congress to regulate interstate commerce.[4] The word "liberty," used in the constitution, is not confined to the mere liberty of person. but includes, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business.[5] When private contracts do regulate interstate commerce, the power of congress can reach them just the same as if the legislation of some State had enacted the provisions contained in those contracts. The power of congress over this subject is more important and necessary than the liberty of the citizen to enter into contracts of a nature which interfere with interstate commerce. The liberty of contracting in such a case would be nothing more than the liberty of doing that which would result in the regulation to some extent the subject which from its general and great importance has been granted to congress as a proper representative of the nation at large. Regulation to any substantial extent by any other power than congress, after congress has spoken, even though such regulation is effected by means of private contracts between its individuals or corporations, is illegal, and is as objectionable when attempted by individuals as by the State itself. In both cases it is an attempt to regulate a subject which, for the purpose of regulation, has been, with some exceptions, exclusively granted to congress, and congress has jurisdiction as much in one case as in the other. Here, then, is the conclusion of the whole matter. Legislation of States, contracts of private parties, and combinations of corporations, which substantially and directly affect interstate commerce are illegal.[6] So where corporations of different States combine, or where they sell their property and take stock for the same in a trust and operate under one management, or where private contracts made whereby interstate commerce is directly affected, such combinations can be controlled under the provisions of the Act of July 2, 1890.[7]

Intrastate Commerce.—But a distinction exists between interstate and intrastate commerce. The former is regulated by congress, the latter by the State. So commerce carried on within the jurisdiction of a State cannot be regulated by congress [8] To delimit interstate and intrastate commerce is not always an easy matter. Interstate commerce does not consist in transportation simply; it includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations. So where a trust created in New Jersey with headquarters in New York city has branches ramifying throughout the United States, producing and selling articles among the States, it is engaged in interstate commerce. But the fact that an article is manufactured for sale does not of itself make it an article of interstate commerce, and the intention of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. It cannot be held that the interstate commerce includes the regulation of all manufacturers which are intended to be the subject of commercial transaction in the future, for then it would include all productive industries that contemplate the same thing. If it did then congress would be invested to the exclusion of the States with power to regulate, not only manufacturers, but also agriculture, horticulture, stock-raising, and the like.[9] The intent of the manufacturer does not determine the time when the article or product passes from the control of the State. And it does not follow

[4] Adyston Pipe & Steel Co. v. United States, 175 U. S. 211.

[5] Allgeyer v. Louisiana, 165 U. S. 578; United States v. Joint Traffic Association, 171 U. S. 505.

[6] Adyston Pipe & Steel Co. v. United States, 175 U. S. 211.

[7] United States v. Freight Association, 166 U. S. 290; United States v. Joint Traffic Association, 171 U. S. 505; Adyston Pipe & Steel Co. v. United States, 175 U. S. 211.

[8] Adyston Pipe & Steel Co. v. United States, 175 U. S. 211.

[9] Coe v. Eroal, 116 U. S. 517.

that an attempt to monopolize or the actual monopoly of a manufacturer is an attempt to monopolize commerce, even if, in order to dispose of the product, the instrumentalities of commerce are necessarily invoked.[10] But when the manufactured article is put into the channel of commerce to leave the State, it becomes interstate, and comes under the power of congress. So when any article produced by a trust in any of its branches in one State, is sent to another State, it becomes subject to the Act of July 2, 1890.

Indirect Control of Trusts by the State.—Whenever a corporation of State is absorbed by a trust it ceases to be a domestic corporation, and the trust owning it is a foreign corporation, which must be subject to the same restrictions and duties as domestic corporations, and have no greater power, if admitted by comity into a State.[11] And a State in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation under its laws may impose such conditions as it deems proper, and the acceptance of the franchises implies a submission to the conditions, without which the franchises could not have been obtained.[12] In fact no foreign corporation can gain admittance into a State unless the State permits. Having no absolute rights of recognition in other States, but depending for such recognition and the enforcements of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. The States may exclude a foreign corporation entirely; they may restrict its business to particular localities, or they may enact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interest.[13] So where a trust absorbs different corporations in different States, it and the corporation absorbed, become foreign to the State other than its domicile, and can be controlled by the State as to conditions of entry into the State, and acceptance of imposed restrictions. But where a State has admitted a foreign corporation into its territory, the only constitutional provisions limiting the power of the State are those which give to congress the power to regulate commerce; and where a State law imposes conditions upon a foreign corporation which operate to restrict interstate commerce, it is void for that reason.[14]

Monopolies are of three kinds: 1. All sources of supply may be put in the hands of one company, so no other source of supply is available. Such a monopoly is absolute, and can sell its product at any price limited to the necessities of commerce. 2. A monopoly may have the best and most economical source of supply, but competition still be possible, which competition can be suppressed by selling so low by the monopoly that competition is impossible. 3. The monopoly may use its general control of the market to require all dealers to buy from it alone under penalty of being denied future supplies. This third method is that generally practiced by the monopoly. The State of Texas passed an act forbidding such contracts. The Waters-Pierce Company is a subordinate corporation of the Standard Oil Company, which appropriates the whole country as to trade of its products. The Waters-Pierce Company having made such contracts as are forbidden by the Texas law, the company was prohibited thereafter from trading in Texas and the officers of the company fined. This case went to the United States Supreme Court, which has lately rendered an opinion,[15] which holds that a State can prohibit such contracts being made within its territory by any foreign corporation, but it cannot apply this authority to interstate commerce. So a State can prevent a foreign corporation from requiring dealers who buy its product to contract that they will buy from no other source of supply.

Many wholesale dealers, in order to maintain prices, compel the retail dealer to sell at certain prices; that is, the retailer buys at a certain discount, and is prohibited from selling below a certain retail price under penalty of losing the opportunity to purchase in future at trade discounts. So it is difficult to distinguish between agreements to maintain a system of retail and wholesale discounts, and contracts intended to maintain a monopoly of

[10] United States v. Knight, 156 U. S. 1.
[11] Harding v. American Glucose Co., 182 Ill. 551.
[12] Ashley v. Ryan, 153 U. S. 436.
[13] Blake v. McClung, 172 U. S. 239, 176 U. S. 59; Paul v. Virginia, 8 Wall. 168; Bank of Augusta v. Earle, 13 Pet. 591-594; Waters-Pierce Co. v. Texas, 177 U. S. 28.
[14] Crutchen v. Kentucky, 141 U. S. 59.
[15] Waters-Pierce Co. v. Texas, 177 U. S. 28.

price and supply. So the decision in the Texas case interferes with the normal working of trade under the wholesale and retail discounts. Texas being a non-distributing State is not affected as a State with a large jobbing trade like Illinois, where agreements to maintain wholesale discounts should be held not in restraint of trade. While the decision of the court interferes with legitimate discounts, yet it clearly shows that the States can regulate a foreign monopoly which wishes to enter into their jurisdiction.

Again, the St. Louis Court of Appeals has decided that a trust cannot cloak its objects under the form of a corporation, and evade the penalties provided by the anti-trust law of Missouri (Act of 1891), which provides that "any purchaser of any article or commodity from any individual, company or corporation transacting business contrary to any provisions of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment." Under the decision accounts with trusts operating as corporations in Missouri are not collectible.[16] The suit was by the National Lead Company against the S. E. Grote Paint Store Company for balance due on account. The evidence showed that the National Lead Trust was organized in 1887 to control the lead business of the country. It continued under the trust form of organization until 1891, at which time it had absorbed thirty companies in the United States and Mexico engaged in the paint and lead business. The attorneys for the National Lead Company said that the defense must fail because the plaintiff was a corporation and not a trust, as in 1891 it was organized in the form of a corporation under the name of the National Lead Company. The court said it must follow that if the stockholders and governing officers of the plaintiff corporation combined with each other to violate any of the provisions of the anti-trust law of Missouri through the instrumentality of their corporate entity, then the corporation composed by them was a party to such illegal combination within both the letter and the spirit of the Act of 1891; that is, a combination which is illegal under the anti-trust law cannot be operated under the cloak of a corporation, and by its constituents, members or growing bodies. This reasoning is conclusive, and is supported by the courts in Illinois, New York and the federal courts, which have passed upon the subject. The corporation, as an entity, may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination that will make it, with them, alike guilty.[17] The St. Louis Court of Appeals decided that the balance of the account could not be collected, as the debt was contracted against the law applicable to illegal combinations.

Wherever there is a combination to suppress competition, to fix the price of commodities and limit their productions, and to restrain trade, it is a monopoly and can be controlled, which has been decided by every court called upon to review such agreement. A trust is created where a majority of the stockholders, in competing companies, consolidate their interests by conveying their property to a corporation, organized for the purpose of taking their property, when the necessary consequence of the combination is to control prices, limit production or suppress competition in such a way as to create a monopoly.[18]

Suppressing Over-Capitalization.—It is obvious that many of the trusts are overcapitalized and pay dividends on fictitious values. This can be remedied by a reasonable taxation by the States where branches of the trusts have property, for personal property, for the purpose of taxation, does not follow the domicile of the owner. The rule that personal property has no *situs* except that of the domicile of the owner is a legal fiction, and must yield whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. For the purpose of taxation, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicile, even if he is not a citizen of the State which imposes the tax.[19] It is well settled that there is nothing in the constitution or the laws of

[16] National Lead Co. v. S. E. Grote Paint Store Co., 2 Mo. App. Rep. 723.

[17] Ford v. Milk Shippers' Association, 155 Ill. 166.
[18] Hardin v. American Glucose Co., 182 Ill. 551.
[19] Marye v. R. R. Co., 127 U. S. 117.

the United States which prevents a State from taxing personal property employed in interstate commerce, like other personal property within its jurisdiction.[20]

Capital Stock.—What is capital stock is answered differently. But where a State comprehends all property for taxation purposes, capital stock includes the entire property, real and personal, tangible and intangible, and assets on hand, as well as franchises of corporations and trusts so-called. When thus defined the value is an entirety, the tangible property may be taken from the total value, and the balance will be the value of the intangible property subject to taxation.[21] And when intangible property is taxed, it is not an additional tax upon the same property, but upon intangible property which has not been taxed as tangible property.[22] And in case of a corporation whose property is scattered throughout different States, by means of which business is transacted in each, the intangible property follows the tangible, and is situated wherever the tangible property is located, and where its work is done in the several States.[23] That the trusts are overcapitalized is obvious, and their tangible property cannot be more than one-tenth of the whole value. But tangible and intangible property should be taxed. It matters not of what intangible property consists, whether privileges, corporate franchises, contracts or obligations, it should be taxed. It is enough that the property of the trusts, though intangible, exists, which has value and produces income, and passes current in the markets of the world. When the tangible property of the trust is scattered through different States, by means of which its business is transacted in each State, the *situs* is where the tangible property is located, and not where the home office of business is. Separate articles of tangible property are joined together by unity of ownership and by unity of use, thereby developing an intangible property which in value exceeds the aggregate of the separate pieces of tangible property, and should be taxed by the States. The basis of taxation should be determined by the value of the entire capital stock of the trust, and such other evidence and rules as will enable the State to arrive at the true value of the entire property of the trust within any of the States, in the proportion which the same bears to the entire property of the trust; and such value includes the proportionate part of the value resulting from the combination of the means by which the business is carried on. If the intangible property was thus taxed, it would bring to light the real value of the capital stock of trusts, and thereby be a means of publishing to the world the fictitious over-capitalization of trusts, and place them on a basis founded upon the real value of their entire property. The federal constitution places no restrictions upon any State to abridge its right to tax at their full value all the instrumentalities used for commerce within its jurisdiction. And there is nothing in the limitations of the constitution which restrains a State from taking intangible property at its real value existing within its territory.[24] To illustrate this principle take an express company. Thus, where an express company's tangible property is worth $4,000,000, and its intangible property $12,000,000, its valuation for taxing purposes is $16,000,000, to be prorated among the States where the express company has tangible property in use, a unity of use for the convenience of pecuniary profit.[25] The same system may be constitutionally applied to trusts.

Conclusion.—1. All acts, whether by legislation of States, combination of corporations, or by contracts of private individuals, which interfered directly with interstate commerce, can be regulated under the Act of July 2, 1890, so there is no need of an amendment. 2. All combinations within a State which form a monopoly in restraint of trade may be regulated by the anti-trust acts of the several States. 3. By a constitutional taxation of intangible property, the interstate trusts can be compelled to divulge the real value of their property.

Bloomington, Ill. DARIUS H. PINGREY.

[20] Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Adams Express Co. v. Ohio, 166 U. S. 185; Walworth v. Harris, 129 U. S. 355; Adams Express Co. v. Kentucky, 166 U. S. 171; Postal Telegraph Co. v. Adams, 165 U. S. 688; Pittsburg, etc. R. R. Co. v. Backus, 154 U. S. 421; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18; Western Union Tel. Co. v. Taggart, 163 U. S. 1.

[21] Henderson Bridge Co. v. Commonwealth, 99 Ky. 623.

[22] Adams Express Co. v. Kentucky, 166 U. S. 171.

[23] Adams Express Co. v. Ohio, 166 U. S. 185.

[24] Adams Express Co. v. Ohio, 165 U. S. 194.

[25] Adams Express Co. v. Ohio, 165 U. S. 194; State v. Jones, 51 Ohio St. 492.

CRIMINAL LAW — PRINCIPAL AND ACCESSORY.

STRAIT v. STATE.

Supreme Court of Mississippi, April 20, 1900.

Where prosecutors had reason to believe their office had been entered by defendant, and hired a detective to investigate the matter, and, under the pretense of getting a bundle he had left, the detective borrowed defendant's key, and entered the office, accompanied by the defendant, when they were immediately arrested, a conviction of the defendant for burglary was improper, because his principal was not guilty, since he entered the office under the license of the prosecutors.

TERRAL, J.: Joshua Strait, a colored boy, was indicted in the circuit court of Lauderdale county of burglary in breaking and entering the law office of Ethridge & McBeath with intent to steal. Ethridge & McBeath were attorneys at law at Meridian, Miss., and, having a belief that their office had been often entered by some person, and having a suspicion that the defendant was such person, one or both of the prosecutors requested Green Morton to trace up the matter. Strait was the office boy at a neighboring office, and had the keys thereto of his master. Green Morton, in laying a snare for the defendant, pretended to him that he had left a bundle in the office of Ethridge & McBeath, and received from Strait the key used by him in his employment, and with it opened the office of Ethridge & McBeath, and entered the same, and the defendant, Strait, also entered with him, and, being immediately set upon, they were arrested, and, the defendant being indicted and convicted of burglary, he appeals. Green Morton, in endeavoring to entrap the defendant, and in getting from him the key with which he opened the office of Ethridge & McBeath, and in leading the defendant into said office, was acting at the instance of the prosecutors, either as a decoy or as a detective, and in either case he was operating under the license of the owners, and could not have been guilty of an unlawful act; and, because Morton was not guilty of burglary, the defendant could not be guilty of burglary in entering the office at the instance and by the act of Morton. Green Morton himself opened the door of the office of Ethridge & McBeath, and, unless he is guilty of burglary as the principal felon, the defendant cannot be guilty of crime. At common law the actual doer of an illegal act amounting to felony was called a principal in the first degree, and another being with him to aid or assist in the commission of the act is denominated a principal in the second degree, and a principal in the second degree could only be guilty of the crime committed by the principal in the first degree. It is plain that Morton is not guilty of burglary, because he was acting at the instance of the prosecutors, and he was expected by the prosecutors to use his own judgment in luring the defendant into a trap to be set for him. Whart. Cr. Law, § 117; U. S. v. Libby, 1 Woodb. & M. 221, Fed. Cas. No. 15,597. In 1 McLean, Cr. Law, § 118, it is said: "The only question in the case of decoys is as to whether defendant has committed a criminal act. Of course, if he has joined with one who pretends to be a confederate, but in reality is acting as a detective, and therefore has no criminal intent, he will not be criminally liable for acts done by the detective, although present to aid and assist; for, while such presence and aid would make him a confederate in the case of a real crime, it cannot render him guilty where no real crime is committed. Thus, it is held that if, in burglary, an officer or a servant, under the instructions of the owner, admits the intended burglar to the house, pretending to be in collusion with him, there is no burglary committed." Maule, J., so ruled in Reg. v. Johnson, Car. & M. 218, 41 E. C. L. 123. Ten of the twelve judges of the exchequer chamber so ruled in Dannelly's case, 1 Russ. & R. 310. And this is the American doctrine. Love v. People, 160 Ill. 501, 43 N. E. Rep. 710, 32 L. R. A. 139; People v. McCord, 76 Mich. 200, 205, 42 N. W. Rep. 1106; Connor v. People (Colo. Sup.), 33 Pac. Rep. 159, 25 L. R. A. 341. The defendant was let into the office of the owners by a decoy operating at their instance, and, however reprehensible the act be morally, he is not guilty of burglary. His conviction was wrongful. The verdict and judgment are set aside and reversed; and a new trial is awarded.

NOTE.—*Recent Decisions on the Law Pertaining to Principal and Accessory in Criminal Cases.*—A person cannot be convicted as a principal for aiding the person who actually committed the crime, unless he is in a position to render, if necessary, some personal assistance, and desired to have the crime committed. State v. Valwell, 66 Vt. 558, 29 Atl. Rep. 1018. Where one is accused of aiding and encouraging another in the commission of a crime, it need not be shown that the crime was committed in pursuance of an understanding between them. Howard v. Commonwealth (Ky.), 27 S. W. Rep. 854. A person present at the commission of a murder, and aiding, either by keeping guard, or by counseling or encouraging the commission of the crime, is equally guilty with the person who delivers the mortal blow. People v. Repke (Mich.), 61 N. W. Rep. 861. Where three persons form a design to kill a person, and one of them provokes a difficulty with him to furnish a pretext for killing him, he is equally guilty with the other two who inflict the wounds. State v. Paxton (Mo.), 39 S. W. Rep. 705. In a trial for murder, an instruction that if defendant was present for the purpose of actual assistance as the circumstance might demand, and the principal was encouraged to take the life of the deceased by the presence of defendant, then defendant aided and abetted in the killing of deceased, is properly given. Singleton v. State (Ala.), 17 South. Rep. 327. It appearing that defendant and W were horse thieves, who had determined to resist arrest to the death, and that in arresting them deceased was shot, it is immaterial that W, and not defendant, fired the shot. English v. State (Tex. Cr. App.), 30 S. W. Rep. 233. When two persons unite in bringing about a quarrel with a third person, which results in one of

them assaulting him, each of the two is a principal. Williamson v. State (Tex. Cr. App.), 29 S. W. Rep. 470. An accessory before the fact to a felony should be prosecuted as a principal. State v. Golden (Wash.), 39 Pac. Rep. 646. All persons who, being present, assist or abet in the commission of murder, may be prosecuted as principals. Hill v. State, 42 Neb. 503, 60 N. W. Rep. 916. Under an information charging defendant with procuring, aiding, and abetting another to commit an assault with intent to wound, defendant may be convicted of assault and battery as principal. Wagner v. State, 43 Neb. 1, 61 N. W. Rep. 85. Under Comp. Laws, sec. 7260, abolishing the distinction between principals and accessories before the fact, it is proper to charge as principal one who counsels and directs a murder. State v. Kent (N. Dak.), 62 N. W. Rep. 631. Under Cr. Code, div. 2, sec. 2 (Rev. St. ch. 38, sec. 274), which declares that an accessory before the fact "shall be considered as principal and punished accordingly," an indictment which charges that one man did acts which constitute murder, and that the defendant then and there feloniously incited him to commit such murder, without alleging that defendant committed the murder, is bad. Fixmer v. People, 153 Ill. 123, 38 N. E. Rep. 667. One who had agreed with others to commit a criminal act, who is not present at the time of its commission, cannot be considered a principal, unless he was, when the act was committed, performing some act in furtherance of the common design. Tittle v. State (Tex. Cr. App.), 31 S. W. Rep. 677. Where two or more persons are charged in an information with premeditated murder by shooting, and the evidence shows that the one on trial did not do the killing, but abetted the crime, the information will be sufficient as to him. State v. White, 10 Wash. 611, 39 Pac. Rep. 160. Where, by the same indictment, two persons are charged with murder in the first degree, the conviction of one of murder in the second degree does not prohibit the trial of the other for the crime charged. State v. Lee (Iowa), 60 N. W. Rep. 119. One who counsels and procures another to commit a murder may be convicted of a higher degree than the evidence shows the other to be guilty of. State v. Gray (Kan.), 39 Pac. Rep. 1050. As there are no accessories in misdemeanors, those whose conduct would constitute them accessories before the fact, if the principal offense were a felony, are, if it be a misdemeanor, guilty as principals. Wagner v. State, 43 Neb. 1, 61 N. W. Rep. 85. On a prosecution for assault, where there is evidence that defendant was an accessory, it is error to instruct that, if defendant was present and "ready" to aid or abet the principal in the assault, he is guilty as principal. Elmore v. State (Ala.), 20 South. Rep. 323. On a prosecution for assault with intent to kill, where there is evidence that defendant was an accessory, an instruction that one is guilty as principal of an offense committed solely by another, when he conspired with the other to commit it, and that the conspiracy need not be shown by positive, but may be shown by circumstantial, evidence, is proper. Elmore v. State (Ala.), 20 South. Rep. 323. A conviction under an indictment charging defendant with having performed an operatin on which prouced an abortion was sustained by evidence that defendant procured another to actually perform the operation in his presence, while he watched for intruders, to prevent interruption. Dixon v. State, 46 Neb. 298, 64 N. W. Rep. 961. That defendant, with other boys, invaded prosecutor's premises, drove prosecutor's companion to the rear of the house, and detained him there while two others robbed prosecutor, is sufficient to show that defendant aided in the robbery, so as to warrant his conviction therefor. State v. O'Keefe (Nev.), 43 Pac. Rep. 918. In a prosecution for assault with a deadly weapon upon J, an instruction is proper that if defendants L and M were present at J's house, telling a third defendant what to say to him, to call him a mill burner, etc., they would be guilty. State v. Jones (N. Car.), 24 S. E. Rep. 493. Where a murder was committed by means of an explosion of dynamite, one who made the preparations by laying the wires and placing the battery and doing all the preliminary work, and in whose presence and with whose knowledge the current was set in motion by another, is guilty. Commonwealth v. Miller (O. & T.), 8 Kulp, 85. An instruction that if a man named C planned a burglary, and the defendant and another agreed to assist therein, and all were present and went into the house in furtherance of the plan, each would be guilty of such burglary, is properly given where defendant has confessed to the facts therein stated, and the burglary has been proved *aliunde*. Attaway v. State (Tex. Cr. App.), 34 S. W. Rep. 112. Where parties act together in the commission of an offense, in pursuance of a common intent, and in pursuance of a previously formed design, they are all alike guilty, whether all were actually present when the offense was committed, or not. McDonald v. State, 34 Tex. Cr. Rep. 556, 35 S. W. Rep. 286. A person present at the time an assault was made upon prosecutor by a third person, but who, by neither act, word, nor gesture, aided the assailant in the assault, cannot be convicted of the assault. Schribe v. State (Tex. Cr. App.), 35 S. W. Rep. 375. An indictment for aiding an officer of a bank in making false entries, etc., is not defective because it charges the principal with having madethe entries with intent to defraud the bank, an also with intent to deceive examining agents, whereas it merely charges the aider with an intent to deceive such agents; for it is immaterial that the principal may have had several intents, if both principal and aider were actuated by the criminal intent to deceive such agents. Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. Rep. 943. Const. art. 1, sec. 11, giving an accused the right to demand the nature and cause of the accusation against him, does not render unconstitutional Hill's Ann. Laws, sec. 2011, abolishing the distinction between principal and accessory before the fact, nor prevent accused who procured the commission of a homicide, but who was not present, from being convicted on an indictment merely charging him with the commission of the overt act. State v. Steeves (Oreg.), 43 Pac. Rep. 947. Under Rev. St. 1889, sec. 3944, providing that every person who shall be a principal in the second degree in the commission of any felony, or who shall be an accessory before the fact, shall, on conviction, be adjudged guilty of the offense in the same degree as a principal in the first degree, the indictment may either allege the matter according to the fact, or charge the principal and the accessory as principals in the first degree. State v. Schuchmann (Mo. Sup.), 33 S. W. Rep. 35, 34 S. W. Rep. 842. Though the distinctions between accessories before the fact and principals are abolished, an indictment first setting out the guilt of the principal offender, and then charging that, "before the commission of said felony, defendant did" "counsel, aid, incite, and procure," said principal to commit the felony, is unobjectionable. State v. Gleim, 17 Mont. 17, 41 Pac. Rep. 998. Under Rev. St. 1874, p. 393, sec. 274, making one who "stands by, and aids, abets, or assists" in the perpetration of a crime, an accessory, and punishable as a principal, the mere

presence of a defendant when a homicide was committed by another, or even his consent thereto, will not authorize his conviction as a principal, where it is not shown that he said anything or did any act to aid, abet, or assist in its commission. Jones v. People, 166 Ill. 264, 46 N. E. Rep. 723. Where four defendants were charged with assault, an instruction that if any of defendants were present at the time of the assault, for the purpose of giving aid if necessary, they were guilty, was not error. Anderson v. State (Ind. Sup.), 46 N. E. Rep. 901. An aider and abettor of a burglary, though he does not come within 40 feet of the house, is equally guilty with one who enters. State v. Pearson, 119 N. Car. 871, 26 S. E. Rep. 117. Where two persons are present, who are acting in concert for an unlawful purpose, and a person is killed by one of them, in pursuance of the common designs, it matters not which one fires the fatal shot. State v. Cannon (S. Car.), 27 S. E. Rep. 526. The evidence showed that defendant and three others were all engaged in the robbery; and that, while two others did the work, defendant and his companion were at hand, ready to give assistance, should occasion require it. Held, that it was not error to charge that all persons who act together in committing an offense are principals; that they may act together, whether bodily present or not, if they act under an agreement to commit an offense, and it was committed in pursuance of a common intent and previously formed design, each party performing his part, which was necessary to the completion of the offense. Colter v. State (Tex. Cr. App.), 39 S. W. Rep. 576. Under Code, sec. 4314, which abrogates the distinction between an accessory before the fact and a principal, making both principals, it is error to charge that a defendant who did not actually commit the act constituting the crime, which was committed by another is guilty, if at all, of whatever offense the evidence shows such other to have committed. State v. Smith (Iowa), 69 N. W. Rep. 269. A person who conspires to commit robbery is guilty of a murder resulting from the attempted perpetration of the crime, though the killing was done in the absence of himself and his co conspirators, by persons employed by the latter to effect the robbery. Isaacs v. State (Tex. Cr. App.), 38 S. W. Rep. 40. One of several persons who enter into an agreement to steal horses generally cannot be convicted as a principal in the theft of a horse taken by other parties to the agreement, he having refused to have anything to do with it. Sessions v. State (Tex. Cr. App.), 38 S. W. Rep. 605. Where two persons are indicted for murder, one as principal in the first degree, and the other as principal in the second degree, the latter may be convicted of murder, although the former has been convicted of voluntary manslaughter only. Bruce v. State (Ga.), 25 S. E. Rep. 760. One charged as a principal in a felony may be convicted on evidence of a conspiracy to commit the crime, and an actual participation in the act constituting the crime. Reed v. State (Ind. Sup.), 46 N. E. Rep. 135. Since Cr. Code, sec. 1, relating to accessories before the fact, merely declares the common law, one charged as an accessory before the fact cannot be convicted as a principal. Casey v. State, 49 Neb. 403, 68 N. W. Rep. 643. Under Rev. St. sec. 6804, providing that one who aids and abets the commission of an offense may be "prosecuted" as if he were a principal offender, one aiding and abetting in the commission of a homicide may be indicted with the principal. Jones v. State, 7 Ohio St. Dec. 305, 14 Ohio Cir. Ct. Rep. 35. Where, in a prosecution for sale of a lottery ticket, it appears that defendant kept a place where the sale of tickets was advertised, and that at the time of the sale he and his brother were waiting on the purchaser, it is immaterial whether defendant personally sold the ticket, since Pen. Code, art. 75, provides that when an offense is actually committed by one or more persons, and others are present, knowing of the unlawful intent, and assist those actually engaged in the unlawful act, such persons are principal offenders. Kaufman v. State (Tex. Cr. App.), 38 S. W. Rep. 771. Where four persons, without any common understanding that they would do whatever might be necessary to avoid arrest, resisted an officer, and one of their number shot him, but not fatally, all of them were not guilty of an assault with intent to murder, even though the one who fired the shot did so with intent to kill. State v. Taylor (Vt.), 39 Atl. Rep. 447. Mansf. Dig. sec. 1505, defining an accessory as one "who stands by, aids, abets, or assists" in the perpetration of a crime, one who is thus indicted as an accessory is charged as a principal in the second degree under the common law, and proof that his principal in the first degree was convicted is irrelevant and immaterial. Williams v. United States (Ind. Ter.), 45 S. W. Rep. 116. If defendant aided and abetted in the killing, he was a principal in the second degree, and not an accessory. Tudor v. Commonwealth (Ky.), 43 S. W. Rep. 187. One who bribes a duly supbœnaed witness to absent himself from the trial cannot be convicted, under Gen. St. sec. 6310, which makes the abettor of a crime punishable as a principal, taken in connection with section 6386, which makes it a felony for a witness to receive a bribe for absenting himself from a trial. State v. Sargent (Minn.), 73 N. W. Rep. 626. One who was present, aiding, abetting, and assisting another while he committed an assault, though not actively participating, is *particeps criminis*. State v. Klein (Wash.), 53 Pac. Rep. 364. Exclamation of C to G to "catch him and kill him," referring to B, with whom C was having some words, could have no effect to establish an agreement between C and G to effect an unlawful purpose, so as to make C answerable for death of W, killed by G striking him with a club while C and B were fighting. State v. May, 142 Mo. 135, 43 S. W. Rep. 637. An information which charges one with embezzlement by aiding and abetting another in the commission of such offense does not charge defendant as an accessory before the fact. State v. Rowe (Iowa), 73 N. W. Rep. 833. Code 1873, sec. 3908, provides that public officers who shall convert to their own use money intrusted to them shall be guilty of embezzlement. Section 4314 abrogates the distinction between an accessory before the fact and a principal, and all persons concerned in the commission of a public offense must be indicted and punished as principals. Held, that one who advises a county treasurer to commit the crime of embezzlement may be a principal, as having aided and abetted in its commission, though he would not have been a principal if he had taken the money. State v. Rowe (Iowa), 73 N. W. Rep. 833. Pen. Code 1895, art. 86, defines an accessory as one who, knowing that an offense has been committed, conceals the offender, or gives him any other aid, in order that he may evade arrest or trial, or the execution of his sentence. Held, that the person charged as accessory must have given some personal help to the offender; and the naked fact that one received stolen property, knowing it had been stolen, would not constitute the receiver an accessory in the burglary. Street v. State (Tex. Cr. App.), 45 S. W. Rep. 577. The death of the principal before indictment is no obstacle to the prosecution

and punishment of one charged with aiding and abetting an officer, clerk, or agent of a national bank to abstract, misapply, or embezzle the funds thereof, in violation of Rev. St. sec. 5209, which makes such offense a misdemeanor. Gallot v. United States (U. S. C. C. of App.), 87 Fed. Rep. 446. Before one can be found guilty as accessory before the fact, the guilt of the principal must be established, and, for the purpose of establishing the principal's guilt, confessions made by him are competent in the trial of one accused as accessory. Brooks v. State (Ga.), 29 S. E. Rep. 485. Under Hill's Ann. Laws, secs. 1289, 2011, abrogating the distinction between principals and accessories, and providing that persons, whether committing a crime or aiding or abetting in its commission, shall be indicted and tried as principals, the conviction of one person charged as principal in the commission of a crime does not operate as an acquittal of another separately charged as principal in the commission of the same crime. State v. Branton (Oreg.), 56 Pac. Rep. 267. A charge that defendants are principals if they acted together in committing an offense according to a previously formed design is erroneous; the statutes requiring principals to be present or to do some act in furtherance of the common design at the time of the commission of the offense. Wright v. State (Tex. Cr. App.), 48 S. W. Rep. 191. Under Pen. Code, sec. 29, providing that a person concerned in the commission of a crime, whether he directly commits the act or aids and abets in it, and whether present or absent, and a person who directly or indirectly counsels or procures another to commit a crime, is a principal, actual presence at the commission of a crime is not necessary to constitute one a principal. People v. Winant, 53 N. Y. S. 695, 24 Misc. Rep. 361. To be guilty as a principal, a person must both aid and abet, under Pen. Code, sec. 971, declaring guilty as principals all persons who aid and abet in the commission of a crime. People v. Compton (Cal.), 56 Pac. Rep. 44. The effect of Cr. Code, sec. 1, which provides that one who shall aid, abet, or procure any other person to commit a felony shall be punished in the same manner "as the persons who committed the felony," is to make such aiding and abetting a substantive and independent crime. Oerter v. State (Neb.), 77 N. W. Rep. 367. A charge that if defendant and another searched for cattle pursuant to a conspiracy to steal them, and the other found them, and drove them to where defendant was, and they then took them together, then the act of such other in taking the cattle would be defendant's act, is erroneous; Pen. Code 1895, arts. 74-78, requiring a person to do some act to aid or encourage another in the commission of an offense at the time it is committed, in order to make him a principal. Bell v. State (Tex. Cr. App.), 47 S. W. Rep. 1010. Under Code 1873, sec. 4314, abolishing the distinction between principals and accessories before the fact, and making aiders and abettors guilty as principals, a conviction of murder as a principal is sustained by proof that the killing was by a third person, in pursuance of a conspiracy with accused. State v. Smith (Iowa), 77 N. W. Rep. 499.

CORRESPONDENCE.

STARE DECISIS.

To the Editor of the Central Law Journal:

The views of your correspondent, John W. Smith, are presented in the form of an *argumentum ad hominem*, hardly worthy of the forum. To the philosophic mind, the doctrine of *stare decisis* is a potent safeguard against the vagaries of human nature. If every judge were at full liberty to decide according to his views at the time, regardless of what went before, a boil on the neck or the pleasant sensations of a good dinner would control. The personal equation is powerful, even on the bench. The conservatism of the law is the most vital element of social order. It is far more important to the community to have the law settled, even wrongly, than to have uncertainty which breeds confusion and brings the law into contempt. Evils that can be located and measured can be cured by legislation; and even courts, when fully satisfied that a precedent is evil or has become inapplicable through change of conditions, do not hesitate to depart from it. Since your correspondent cites the Supreme Court of the United States as upholding precedents discarded in other countries, it may be well for him to consider the action of that court in two later instances. In the sugar duty case, the court uphold, upon the doctrine of *stare decisis*, what it regarded as a faulty construction of the revenue law, because this construction had been adopted by the public and the administering officers, and had become so far settled, generally understood and acquiesced in, that to disturb it would bring greater evils—a case where the remedy was perhaps worse than the disease. In the matter of patent reissues, coming up the same term, the same court did not hesitate to discard the doctrine of *stare decisis* and overturn the construction of the statute settled by its own and the adjudications of federal courts for fifty years previously. These instances at least show that the supreme court is not wedded to the doctrine of *stare decisis*, but rather indicate a tendency toward the evils which a more consistent application of the doctrine would prevent. The doctrine, is, at best, not so much a hard and fast rule as a guide; and it should be remembered that it is not the function of courts to make law but to ascertain and administer it. There may be hardship in individual cases in applying a fixed rule, but obedience to law is itself a hardship when the law is unsettled and doubtful—and all thoughtful men will admit that the latter is the greater evil.

LEWIS M. HOSEA.

Cincinnati, Ohio.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTIONS—Deceit—Survivor.—Where executors allege that defendants, attorneys, by misrepresentation obtained from deceased a note secured by a mortgage on certain of her property, and that the mortgage was foreclosed and a deficiency decree entered, and pray a reconveyance, and repayment of the deficiency judgment, the demand for repayment of the deficiency judgment was not within the scope of such suit, as it is damage only to deceased, recoverable only in an action of tort.—ALLEN v. FRAWLEY, Wis., 82 N. W. Rep. 593.

2. APPEAL—Rights of Third Party.—A third person, appealing from a judgment rendered in a controversy between others, is entitled to avail herself of everything in the record affecting her rights, to the end of showing that as between the parties the judgment is erroneous, and that if corrected as to them, and a right judgment rendered, her rights will not be injuriously affected.—MUTUAL LIFE INS. CO. v. HOUCHINS, La., 27 South. Rep. 657.

3. ARBITRATION AND AWARD—Award of Arbitrator.—The *ex parte* presentation of a list of authorities to an arbitrator after final submission of the case renders the award void, without reference to whether the arbitrator's decision was influenced thereby or not, especially when the parties have stipulated that neither shall be represented by counsel.—HEWITT v. VILLAGE OF REED CITY, Mich., 82 N. W. Rep. 616.

4. ASSAULT AND BATTERY—Justification.—In an action for assault and battery, which defendant justified by an opprobrious epithet applied by plaintiff to defendant's son, an instruction that mere words, though insulting, do not justify an assault and battery, and that no assault is justified, unless for some assault by the other party, was proper.—GOUCHER v. JAMIESON, Mich., 82 N. W. Rep. 662.

5. ASSIGNMENT—Preferences.—The fact that a debtor made certain transfers of his property to creditors which amounted to preferences, and the next day made a general assignment, is not of itself a sufficient circumstance to sustain a finding that the creditors had knowledge of his intent to assign, since evidence equally consistent with the theory of innocence as with that of guilt should be interpreted to negative the idea of wrongdoing, and a mere surmise or conjecture will not support a finding of fact.—SHOTWELL v. DIXON, N. Y., 57 N. E. Rep. 178.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS—Usury.—Where an assignment is made for the benefit of creditors, and an obligation of the debtor, which is illegal by reason of usury, is presented against the estate, the assignee may set up the defense of usury, and resist the payment of such illegal claim.—BLAKEMAN v. BUSBY, Kan., 60 Pac. Rep. 1064.

7. ASSIGNMENT OF WAGES—Validity.—An assignment of wages to become due, without limit as to amount or time, and without acceptance by the employer, and without notice to an attaching creditor, is void as to such creditor.—STEINBACH v. BRANT, Minn., 82 N. W. Rep. 651.

8. ATTACHMENT.—If a resident of this State, with fixed, set intention to remove to another State, and there reside, in pursuance of such intention goes out of this State, he is, within the meaning of the attachment law, a non-resident of this State directly he begins the removal of his person from the place of his residence, even before he gets outside the State, and, to constitute him a non-resident, he need not acquire either a domicile or residence in another State.—STATE v. ALLEN, W. Va., 35 S. E. Rep. 990.

9. ATTACHMENT — Wrongful Attachment—Judgment Against Constable.—Where a constable sued on a note given by execution creditors for property wrongfully attached and sold, for the value of which the true owner had recovered judgment against the constable, which had been paid by his sureties, on death of the constable pending action on the note the sureties are subrogated to the constable's right of action on the note.—MEYER BROS. DRUG CO. v. DAVIS, Ark., 56 S. W. Rep. 788.

10. BANKRUPTCY—State Law—Preferences.—Under the federal bankrupt act of 1898, declaring that an assignment for the benefit of creditors shall constitute an act of bankruptcy, and that proceedings commenced under State insolvency laws before the passage of the act shall not be affected thereby, a trustee in insolvency, to whom an insolvent debtor made an assignment under a State insolvent law (Gen. St. ch. 52) after the federal law went into effect, acquired no such interest in the insolvent's estate, as will entitle him to maintain an action to set aside a fraudulent and preferential conveyance made within 60 days prior to the assignment, though no adjudication of bankruptcy has been had against the insolvent in the federal courts.—KETCHAM v. MCNAMARA, Conn., 46 Atl. Rep. 146.

11. BANKS AND BANKING—Stockholders.—Under Gen. St. Minn. § 2501, declaring that a stockholder in a bank shall be individually liable for a sum double the amount of the stock held by him for all the debts of the bank, and sections 5905-5907, 5911, authorizing enforcement of the double liability of stockholders by one suit in equity, etc., a suit by the receiver of a bank and all participating creditors was not bad for misjoinder of parties plaintiff, since such liability is several as to each stockholder to all the creditors, but joint in that it requires one action in equity, in which all the creditors participating must appear on one side, and all the stockholders over whom jurisdiction can be obtained on the other.—FINNEY v. GUY, Wis., 82 N. W. Rep. 595.

12. BENEFICIAL ASSOCIATIONS—Proof of Death—Certificate.—Neither the benefit certificate issued by a beneficial association, nor the laws or constitution of the association, required proofs of death to be made by the beneficiary, and the laws of the order required two officers of each subordinate lodge to forward proofs to the supreme keeper of records on the decease of any member of such lodge. Held, that where, on death of a member, the lodge made no proofs of death, the beneficiary was not prejudiced thereby, since she was not bound to take any steps, save to demand the sum due under the certificate, and a showing of such demand, and proof of the certificate, made a *prima facie* case against the society.—DOGGETT v. UNITED ORDER OF GOLDEN CROSS, N. Car., 36 S. E. Rep. 26.

13. BILLS AND NOTES—Action—Pleading.—In an action of debt or *assumpsit* upon a promissory note or bond it is indispensable to aver non-payment, and that to every party connected with the note entitled to receive payment, whether payee, assignee, decedent, or representative, or survivors of decedents, and each one of parties jointly entitled to receive payment.—SMOOT v. MCGRAW, W. Va., 35 S. E. Rep. 914.

14. BILLS AND NOTES—Parol Evidence.—A written obligation, after payment thereof, does not preclude the makers and indorsers from proving by parol evi-

dence a contemporaneous oral agreement as an inducement thereto; fixing their ultimate liabilities among themselves in accord with the true consideration and purpose of entering into such obligation.—FAULKNER v. THOMAS, W. Va., 35 S. E. Rep. 915.

15. BOARD OF EDUCATION—Liability for Torts.—"A *quasi* municipal corporation, like the board of education of a city, is never liable for the consequences of a breach of public duty or the neglect or wrong of its officers unless there is a statute expressly imposing such liability."—BOARD OF COMMRS. OF KEARNY COUNTY v. WILLIAMS, Kan., 60 Pac. Rep. 1045.

16. CARRIERS OF PASSENGERS—Fare of Minor—Liability of Parent.—The law implies a contract on the part of a parent who enters a railroad train with a child *non sui juris*, and subject to payment of fare, to pay the fare of such child.—BRAUN v. NORTHERN PAC. RY. CO., Minn., 82 N. W. Rep. 675.

17. CARRIERS OF PASSENGERS—Mail Agent's Negligence.—A railroad company is not primarily liable for the negligence of a mail agent, but it owes a duty of not permitting dangerous habits of its agent in delivering packages from the car in such manner as to endanger persons lawfully on its premises to continue; and evidence of such a practice for a considerable period is notice to the company rendering it liable to one lawfully on its premises and injured by such practice.—SHAW v. CHICAGO & G. T. RY. CO., Mich., 82 N. W. Rep. 618.

18. COMPOSITION WITH CREDITORS—Bank.—An agreement for a composition by the creditors of an insolvent bank, which upon its face implies co-operation of all to whom it is indebted, will not authorize the person to whom it is delivered to effect such composition to consent to any settlement not concurred in by all of the creditors of such bank.—ABEL v. ALLEMANIA BANK, Minn., 82 N. W. Rep. 684.

19. CONTRACT—Modification by Parol.—A contract not under seal, and containing no restrictions against it, may be changed and modified by a subsequent parol agreement.—VAN SANTVOORD v. SMITH, Minn., 82 N. W. Rep. 642.

20. CORPORATION—Certificate of Stock—Transfer.—Sand. & H. Dig. §§ 1337, 1338, providing that whenever a stockholder in a corporation shall transfer his stock a certificate of such transfer shall be deposited with the county clerk of the county in which such corporation transacts its business, who shall note the time of such deposit, and record it in a book for that purpose, and that the transfer shall not be valid as against any creditor of such stockholder until the deposit of the certificate, does not apply to transfers by way of pledge, but only to absolute sales.—BATESVILLE TEL. CO. v. MEYER SCHMIDT GROCER CO., Ark., 56 S. W. Rep. 784.

21. CORPORATIONS—Powers and Purposes.—The powers of a corporation, and the purposes for which it is organized, must be determined by the articles of incorporation; and it can exercise no powers other than those therein specified, and such as may be incidental thereto.—GOULD v. FULLER, Minn., 82 N. W. Rep. 673.

22. CORPORATIONS — Power to Execute Mortgage—Pledgees.—Where a steamboat company was organized for the purpose of acquiring and operating certain boats, the assumption by the corporation of a debt which the seller of the boats had contracted in the construction of the boats, and the execution of a mortgage to secure the debt, were within the powers of the corporation,—especially when done with the approval of all of the stockholders.—FARMERS' BANK OF KENTUCKY v. OHIO RIVER LINE STEAMBOAT CO., Ky., 56 S. Rep. 749.

23. CORPORATIONS—Preferred Creditors—Receiver.—The right of the court appointing a receiver for a corporation to give priority of payment to unsecured debts over the lien of first mortgage bonds is restricted to creditors of railroads, which are public concerns, and cannot be exercised to give unsecured creditors of an ordinary corporation such preference over contract liens.—MERRIAM v. VICTORY PLACER MIN. CO., Oreg., 60 Pac. Rep. 997.

24. CORPORATIONS — Stockholders' Liability.—The equity rule that, where one of many parties having a common interest in a trust fund successfully prosecutes proceedings to collect it for the benefit of all interested in it, he is equitably entitled to reimbursement for his reasonable expenses in the premises out of the fund before its division, applies to an action to enforce stockholders' liability, where the action is so prosecuted by one creditor for the benefit of all.—HELM v. SMITH-FEE CO., Minn., 82 N. W. Rep. 630.

25. COUNTIES—Nuisance—Liability.—Where a county conducted sewage from its alms house and penitentiary to reservoirs on its farm appurtenant thereto, from which it was thereafter spread on the land, creating a nuisance to plaintiff, an adjoining landowner, and polluting the stream on which he was a riparian proprietor, plaintiff was not entitled to recover damages therefor, nor to enjoin such nuisance, in an action against the county, since such acts were done by it in its governmental capacity.—LEFROIS v. MONROE CO., N. Y., 57 N. E. Rep. 185.

26. COUNTY — Covenants — Negligence.—A county which, lacking a court house, rents a building from a private individual for county purposes, impliedly obligates itself to the lessor for carefulness and prudence in the use of it, and may enter into a written agreement of lease containing the ordinary covenants against waste, etc.; and if, through the negligence of the officers charged with the duty of caring for the premises, the building is destroyed by fire, the county is responsible in damages for its value.—WILLIAMS v. BOARD OF COMRS. OF KEARNY CO., Kan., 60 Pac. Rep. 1046.

27. CRIMINAL EVIDENCE — Homicide—Dying Declarations.—Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts to which the declarant could have thus testified, they are admissible. Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible.—STATE v. BURNETT, W. Va., 35 S. E. Rep. 983.

28. CRIMINAL EVIDENCE — Larceny — Declarations.—After the foundation therefor has been laid by the introduction of evidence sufficient, *prima facie*, to justify a finding by a jury of a conspiracy to commit a crime, the acts and declarations of each conspirator are admissible in evidence against each and all of his co-conspirators, if such acts and declarations were in furtherance of the common purpose. Care, however, must be taken that the declarations or acts thus admitted be those only which were made or done during the pendency of the criminal enterprise, and in furtherance of its objects. Rule applied, and held, that the trial court erred in receiving in evidence the declarations of the defendant's alleged co-conspirator.—STATE v. PALMER, Minn., 82 N. W. Rep. 685.

29. CRIMINAL LAW — Appeal of State.—Code, § 1237, provides that an appeal may be taken by the State in criminal cases when judgment has been given for defendant on a special verdict or a demurrer, or on motion to quash or in arrest of judgment, and in no other cases. Held, that where a defendant pleaded, "Not guilty," and the jury was impaneled, and, it appearing that the warrant had been issued without any affidavit, the court refused to withdraw a juror or dismiss the action, and directed the clerk to enter a verdict of not guilty, and defendant was discharged, the State could not appeal from the judgment on the general verdict.—STATE v. SAVERY, N. Car., 36 S. E. Rep. 22.

30. CRIMINAL LAW—False Pretenses—Indictment.—A letter sent by defendant to a wholesale house ordering dry goods, with letter head "B M W & Co., Hardware and Stoves, Dry Goods, Boots and Shoes, and Groceries," and signed by B M W & Co., contained no representation that one B M W, a dealer in hardware and

stoves in the same town, was the writer, and hence defendant was not guilty of obtaining goods by false pretenses.—COWAN v. STATE, Tex., 56 S. W. Rep. 751.

31. CRIMINAL LAW—Homicide — Insanity.—Where insanity was the defense on a trial for murder, an instruction that defendant might be of sufficient mind to intend the murder, and yet not be of such understanding and control of his mind as to cooly deliberate murder, and, if the jury so found, it must find defendant guilty of murder in the second degree, was properly refused, since defendant, under his plea of insanity, could only be found guilty of murder in the first degree or innocent.—STATE v. HOLLOWAY, Mo., 56 S. W. Rep. 734.

32. CRIMINAL LAW—Lottery—Duplicity.—An information is bad for duplicity which charges in a single count that on a certain date, and on divers days between that and a subsequent date, the defendant did publicly and privately open, set on foot, and carry on a lottery. The offense is not a continuing one, but each day the lottery is carried on constitutes a separate and distinct crime.—STATE v. DENNISON, Neb., 82 N. W. Rep. 628.

33. CRIMINAL LAW—Murder—Rape — Malice.—A homicide committed in perpetrating or in attempting to perpetrate rape is murder, though there was no malice, and defendant killed deceased by striking her head on the floor to keep her quiet, and without any intent to kill.—STATE v. CROSS, Conn., 46 Atl. Rep. 148.

34. DAMAGES—Torts — Interest on Loss.—In computing damages in an action for injuries to property caused by defendant's negligence, plaintiff is entitled to a sum equal to what would be the legal rate of interest on the amount of compensation to which he is found to be entitled, computed from the date when the loss was suffered, where defendant knew, or could have known by inquiry immediately after the injury, what the amount of plaintiff's damage was.—NEW YORK, ETC. R. CO. v. ANSONIA LAND & WATER CO., Conn., 44 Atl. Rep. 157.

35. DEED — Accretion and Reliction.—Ownership of patented lands to the meander line of a lake carries with it the right to all lands formed by accretion or reliction below such lands to the water's edge.—HINCKLEY v. PEAY, Utah, 60 Pac. Rep. 1012.

36. DEED AS MORTGAGE—Written Defeasance.—A devisee competent to contract, having made an absolute deed to the executor of his interest in land as devised, is prevented by Act June 8, 1881 (P. L. 84), from recovering the land on the ground that the deed was a mortgage, where there was no written defeasance.—MCDONALD v. STURTEVANT, Penn., 46 Atl. Rep. 142.

37. DEPOSITIONS — Misconduct of Notary — Suppression.—Where a notary taking depositions read to the witness, from a memorandum furnished by plaintiff's counsel, and not returned with the depositions, what the witness was expected to testify to each interrogatory, for the purpose of refreshing the witness' memory whenever he failed to state in reply to an interrogatory any matter contained in the memorandum, such action was in violation of Rev. St. art. 2284, requiring an officer taking depositions to take the witness' answers to interrogatories; and hence a refusal to suppress the depositions was error, though defendants failed to show that injury resulted to them by such irregularity.—RICE v. WARD, Tex., 56 S. W. Rep. 747.

38. EJECTMENT — Purchaser of Lands — Unpaid Purchase Money.—Defendant took possession of lands purchased from plaintiff, to be paid for in three payments. Two payments having been made, the period for the third payment was extended under an agreement that plaintiff was to be relieved from his obligations and defendant should forfeit all payments made if he failed to make the payment within 60 days after its maturity. Defendant refused to make the last payment because plaintiff's title was not good. Defendant had made valuable improvements on the land. He refused to either pay or surrender possession. Held, that plaintiff could recover in ejectment, and whatever cause of action defendant had to recover the purchase money and value of the improvements was no defense.—HALE v. SMITH, Cal., 60 Pac. Rep. 1032.

39. ELECTIONS — Canvass — Mandamus.—While *mandamus* is the proper legal and efficacious remedy provided by statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, *certiorari* may be resorted to for the purpose of reviewing their erroneous rulings, although *mandamus* would furnish more speedy, less expensive, and more adequate relief.—DUNLEVY v. COUNTY COURT OF MARSHALL CO., W. Va., 35 S. E. Rep. 956.

40. EMBEZZLEMENT — Indictment.—The same rules with reference to the property embezzled and the ownership thereof apply in cases of embezzlement as apply in cases of larceny. Unless the pleader is released from this exactness by special statute, the goods and the ownership must be set out in the indictment and proved with the same exact completeness as in larceny.—STATE v. NELSON, Minn., 82 N. W. Rep. 674.

41. EQUITABLE LIEN—Assignment.—V, by deed dated November 22, 1876, conveyed a tract of land to E and A, the wives of B and H, and, to secure a residue of the purchase money to V, at the same time E and A, together with their husbands, made a deed of trust to R, trustee, the acknowledgment of which was wholly insufficient. Held that, although said trust deed conveyed no title from the wives to the trustee, yet the two deeds must be taken together, and an equitable lien is thereby created in favor of V, which can only be enforced in a court of equity.—SCHMERTZ v. HAMMOND, W. Va., 35 S. E. Rep. 945.

42. EVIDENCE—Master and Servant—Declarations of Servant.—In an action to recover for injuries to plaintiff's horse, caused by excessive driving, declarations of the servant of plaintiff that the horse had not been driven excessively are not binding upon the plaintiff, they not being made by authority, or required by his occupation.—GUERIN v. NEW ENGLAND TELEPHONE & TELEGRAPH CO., N. H., 46 Atl. Rep. 185.

43. EXECUTORS AND ADMINISTRATORS — Attorney's Services—Parol Agreement.—Where an administrator orally agrees to become personally responsible for legal services rendered the estate, and credit is given to him individually, such agreement is not a promise to answer for the debt of another within the statute of frauds, though he receives no personal advantage from the services.—MEADE v. BOWLES, Mich., 82 N. W. Rep. 658.

44. FORCIBLE ENTRY AND DETAINER—Who May Maintain.—The gravamen of the action of forcible entry and detainer is the unlawful and forcible entry upon and detention of real property. The action of forcible entry and detention may be maintained by one who has been deprived of the possession of real property by an unlawful and forcible entry thereon by a person having the absolute title and present right of possession.—TARPENNING v. KING, Neb., 82 N. W. Rep. 621.

45. FRAUDULENT CONVEYANCE — Preference—Consideration.—A conveyance, in consideration of an antecedent debt, from an insolvent to his creditor, without fraudulent intent in the creditor, though the creditor know of his debtor's insolvency, does not, alone, stamp the conveyance as one fraudulent in fact and utterly void; but it stands for the benefit of all creditors, including the one thus preferred.—HEROLD v. BARLOW, W. Va., 36 S. E. Rep. 8.

46. GARNISHMENT—Process—Service.—Service of writ of garnishment in an attachment proceeding on one who had acted as defendant's agent, when defendant could not be found, and had no last place of residence, there being no service of the attachment and inventory on the garnishee, was insufficient, under Pub. Acts 1887, No. 52, providing that in such cases a copy of the attachment and inventory shall be left with the garnishee.—PAUL v. BEUCUS, Mich., 82 N. W. Rep. 659.

47. HOMESTEAD—Business Homestead—Deed of Trust.—A deed of trust of a business homestead is valid; the owner having at the time and prior to the execution thereof formed the intention to abandon the premises as a business homestead, and followed this by conduct unequivocally showing an abandonment, and a continuation of the intention previously formed.—SANGER v. HICKS CO., Tex., 56 S. W. Rep. 775.

48. HUSBAND AND WIFE—Distribution of Deceased Wife's Surplus.—Under Ky. St. § 2182, providing that after the death of either husband or wife "the survivor shall have an absolute estate in one-half of the surplus personalty left by such decedent," the survivor does not take one-half of the gross personalty left by the decedent, but only one-half of what is left after payment of the funeral expenses, charges of administration, and debts.—TOWERY v. MCGAW, Ky., 56 S. W. Rep. 727.

49. INJUNCTION—Damages—Bond.—At common law, damages occasioned by the suing out of an injunction were not recoverable, unless the suit was without probable cause, or prosecuted through malice.—GLEN JEAN, LOWER LOUP & D. R. CO. v. KANAWHA, GLEN JEAN & E. R. CO., W. Va., 35 S. E. Rep. 978.

50. INJUNCTION—Nuisance—Police Regulations.—An injunction will issue to enforce ordinances, police regulations, and customs of a neighborhood in matter of a partition wall and ventilation in a stable. This does not render necessary interference with defendant's premises, its occupation, or use. It may continue without change until it is determined to what extent repairs or changes are necessary in order to maintain police regulations or custom.—DUBOS v. DREYFOUS, La., 27 South. Rep. 668.

51. INJUNCTION—Cities—Electric Light Charges.—If the mayor and council of a city threaten to exceed their authority and adopt an ordinance which will be prejudicial to the rights of an individual, an injunction may, in a proper case, issue against them, but not against the city.—WABASKA ELECTRIC CO. v. CITY OF WYMORE, Neb., 82 N. W. Rep. 626.

52. INJUNCTION — Wrongful Injunction—Action for Damages.—In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved.—HESS v. OREGON GERMAN BAKING CO., Oreg., 60 Pac. Rep. 1011.

53. INSURANCE—Proofs of Loss—Agent's Authority.—A fire insurance company's agent, with full power to adjust and pay all claims against the company, had authority to waive provisions in the policy requiring service of proofs of loss and appointment of appraisers.—SMALDONE v. PRESIDENT, ETC., OF INSURANCE CO. OF NORTH AMERICA, OF PHILADELPHIA, PENN., N. Y., 57 N. E. Rep. 168.

54. INSURANCE—Sale of Insured Property.—Where, during the life of the policy, a decree is obtained *in invitum* for the sale of the property insured, but sale under said decree is not made until after the loss by fire, and then the property is bought in by the assured, and there is no change of possession, the policy will not be avoided by a clause therein providing that the policy shall become void if any change takes place in the title, interest, location, or possession of the property, or any part thereof, whether by sale, gift, or other voluntary act of the assured, or by legal process or judgment, or otherwise.—CLEAVENGER v. FRANKLIN FIRE INS. CO. OF WHEELING, W. Va., W. Va., 35 S. E. Rep. 998.

55. JUDGMENTS—Set-Off—Attorney's Liens.—In an action brought by a judgment debtor against his judgment creditor to off-set mutual judgments, held, that the judgment debtor may, without prejudice as to an attorney's lien upon the other judgment, off-set the mutual judgments, provided the action for that purpose be commenced without notice of the attorney's lien.—MORTON v. URQUHART, Minn., 82 N. W. Rep. 653.

56. JUDGMENT AGAINST PARTNERS—Execution—Levy.—A levy on an undivided half of a portion of partnership property owned equally by two partners is invalid, where the judgment is against one of the partners individually.—ERNEST v. WOODWORTH, Mich., 82 N. W. Rep. 661.

57. JUDGMENT LIEN—Notice of Title.—Notice, while the time for answer is running, to the attorney of the judgment creditor, of the fact that lands standing in the name of the judgment debtor belong to the plaintiff, is imputable to the judgment creditor.—BATES v. A. E. JOHNSON CO., Minn., 82 N. W. Rep. 649.

58. JUDICIAL SALE — Confirmation — Reversal—Appraisement.—A court of equity, when justice requires it, and its powers are seasonably invoked, may vacate an order confirming a judicial sale, and discharge the purchaser, who has become such through fraud, accident, or mistake.—KAMPMAN v. NICEWANER, Neb., 82 N. W. Rep. 623.

59. LANDLORD AND TENANT—Eviction—Breach—Damages.—When an action is brought by a tenant against his landlord for an eviction, based on the wrongful acts and bad faith of the landlord, the damages resulting from a breach of the lease may be shown under an allegation of general damages.—SALZGEBER v. MICKEL, Oreg., 60 Pac. Rep. 1009.

60. LANDLORD AND TENANT — Negligence—Owner.—Where the owner of the fee of leased premises is sued for negligence in their management, resulting in injuries to one invited on the premises, a special plea alleging the leasing of the premises was demurrable, since the owner may prove, under the general issue, that he is not the "owner," within the meaning of that term, in a declaration for negligence, the term, in that sense, implying one charged with an active duty toward the premises.—MCKEE v. MCCARDLE, R. I., 46 Atl. Rep. 181.

61. LAW OF THE CASE — Appeal.—Where in deciding an appeal the supreme court, in its opinion, said, "We must not be understood, by any means, as expressing any dissatisfaction with the ruling of the circuit judge that the telegrams and letters [set out in his judgment] were competent, under the circumstances of this case," such statement constitutes a decision that the telegrams and letters were competent evidence; and the assumption, in a petition for rehearing, that the court regarded them as incompetent, and only made competent for the purposes of the case by not having been objected to, is erroneous.—ROSS v. JONES, S. Car., 36 S. E. Rep. 1.

62. LIFE INSURANCE—False Application—Fraud.—On the death of the insured, an illiterate negress, the defendant company refused to pay the policy because of falsehood in answering certain interrogatories in the application. Plaintiff, the beneficiary, gave notice of proof that insured was old, and unable to read; that all questions asked her she truthfully answered; that the application had not been read over to her, or signed by her, and that she did not know its contents; and that the false answers were made solely through the fraud of defendant's agent taking the application. Held, that it was error to strike this notice from the files as insufficient, and peremptorily instruct for defendant, especially as defendant still retained the premium paid, claiming it under a forfeiture clause of the policy it sought to avoid.—LEWIS v. MUTUAL RESERVE FUND LIFE ASSN., Miss., 27 South. Rep. 649.

63. LIFE INSURANCE — Policy — Intemperance of Insured.—Where a life insurance policy provided that, should the insured become so intemperate as to impair his health, or to induce delirium tremens, the company should have the unquestioned right, on becoming satisfied of such fact, to terminate the contract, held, the insurer could not terminate the contract unless, as a matter of fact, the insured was so intemperate as to impair his health, or induce delirium tremens.—JANNECK v. METROPOLITAN LIFE INS. CO., N. Y., 57 N. E. Rep. 182.

64. LIMITATIONS — Acknowledgments.—An acknowledgment in writing, to operate as a new promise to re-

move the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement.—STILES v. LAUREL FORK OIL & COAL CO., W. Va., 35 S. E. Rep. 986.

65. LIMITATIONS — Commencement of Action.—A suit begun by the issuance of a summons, and dismissed at rules for the mere failure of the plaintiff to file his declaration, will not save a second suit for the same cause of action, brought within one year after such dismissal, from the statute of limitations.—LAWRENCE v. WINIFREDE COAL CO., W. Va., 35 S. E. Rep. 925.

66. LIMITATION OF ACTIONS — Judgments.—Code 1873 fixed the limitation of actions on judgments at 20 years after 15 years next following their rendition, and section 50 provided that the act should not affect any act done, any right, or suit had or commenced before the act took effect, but such proceedings should be conformed to its provisions as far as consistent. Held, that the rights referred to were those arising from obligations, not such as pertain exclusively to remedies, and hence this act applied to judgments rendered while it was in force, rather than an act fixing a shorter limitation in force when the debt was contracted.—NORRIS v. TRIPP, Iowa, 82 N. W. Rep. 610.

67. LIMITATION OF ACTIONS—Pleading.—A plea of limitations need not state the time at which the cause of action accrued, where that fact appears from the petition; it being sufficient to allege merely that the claim is barred by the lapse of time and the statute of limitations, and that defendant relies thereon in bar of a recovery.—LILLY v. FARMERS' NAT. BANK OF RICHMOND, Ky., 56 S. W. Rep. 722.

68. MANDAMUS—Injunction — Dissolution.—Where a defendant in injunction applies for the dissolution of the writ, on furnishing bond, and his application is denied, and it appears to this court, upon an application for a *mandamus* to compel the court *a qua* to grant the same, that no injury will result to the plaintiff in injunction by the dissolution thereof, and that irreparable injury may result to the defendant from its maintenance, and further appears that the remedy by appeal will be of no avail, and that the relator will otherwise be without remedy, the *mandamus* will be issued.—CITY OF NEW ORLEANS v. JUDGE OF DIVISION B, CIVIL DISTRICT COURT, La., 27 South. Rep. 697.

69. MANDAMUS—Violation of Injunction.—A *mandamus* will not go to compel a party to violate an injunction, even though the applicant for *mandamus* is not a party to the injunction. A *mandamus* will go only to secure or protect a clear legal right, and not to accomplish a wrong, or the violation of the constitution.—STATE v. COUNTY COURT OF WYOMING CO., W. Va., 35 S. E. Rep. 969.

70. MARRIED WOMEN—Antenuptial Contracts—Liability of Husband.—Const. art. 16, § 5, providing that the property of a married woman shall not be liable for her husband's debts, and Comp. Laws 1897, § 8693, enacting that "the husband of any married woman shall not be liable to be sued upon any contract made by such married woman in relation to her sole property," abrogate the common law making a husband liable for his wife's antenuptial contracts.—SMITH v. MARTIN, Mich., 82 N. W. Rep. 662.

71. MASTER AND SERVANT — Incompetent Servants.—It is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient appliances and machinery, or other means, by which it is to be performed, and to keep them in repair and order. The liability of the employer is the same whether he totally fails to provide persons to perform a duty he owes to his servants, or provides persons who are incompetent and unskillful.—DIXON v. PITTSBURG & G. LUMBER CO., La., 27 South. Rep. 654.

72. MASTER AND SERVANT—Injury—Minor — Assumption of Risk.—A boy 17 years old, and of ordinary intelligence, who is injured by dangerous machinery, near which he has been set to work by his master, and the dangerous character of which was as apparent to him as to the master, cannot recover therefor merely because he is a minor, where the injury was caused by reason of his own negligence and inattention to what he was doing; there being no necessity for him to expose himself to the danger in the prosecution of his own work.—MOREWOOD CO. v. SMITH, Ind., 57 N. E. Rep. 199.

73. MASTER AND SERVANT — Negligence.—In the absence of defects in a machine at which the operator was injured, which added to the danger of operation, the promise of the employer to fix it does not render him liable.—HIGGINS v. FANNING, Penn., 46 Atl. Rep. 103.

74. MASTER AND SERVANT—Negligence—Disregard of Rules and Regulations.—When rules and regulations established by the master are habitually disobeyed, with the knowledge or express consent of the master, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that the master (whose duty it is, not only to make and promulgate, whenever engaged in a business of such a nature as to require it, suitable rules and regulations for the protection of his servants, but also to use due care and diligence to have them enforced) must have become aware of such habitual disregard, and approved the same, such rules and regulations will be disregarded.—KONOLD v. RIO GRANDE W. RY. CO., Utah, 60 Pac. Rep. 1021.

75. MASTER AND SERVANT—Negligence of Fellow-Servant.—In case it is established by the evidence that the plaintiff was the foreman of a gang of laborers who were engaged in hauling dirt with a train of flat cars, and sustained injury by a collision of the train with a cow on the track in the nighttime, and which accident was caused or contributed to by the conductor's abandonment of the train, the defendant will not be relieved from liability on the ground that the plaintiff and conductor were fellow-servants.—DOBSON v. NEW ORLEANS & W. R. CO., La., 27 South. Rep. 670.

76. MECHANICS' LIENS—Material-Men — Entire Structure.—Under Hill's Ann. Laws, § 3669, providing that material-men shall have liens on any "structure" where a stamp mill and tramway is built from the mill to the mine, the mill, mine, and tramway do not constitute such an entire "structure," so as to invalidate a mechanic's lien filed for material used in erecting the mill and in constructing the tramway, because such lien was not filed against the mine also.—WATSON v. NOONDAY MIN. CO., Oreg., 60 Pac. Rep. 994.

77. MECHANIC'S LIEN—Notice—Improvements.—Lumber furnished for the purpose of building an office and putting in floors and ceiling an office in the building, and putting in stairs and elevators, and erecting a shed behind the building, was furnished for "improvements," within Code, § 3089, giving a lien for lumber furnished for improvements on land.—NATIONAL LIFE INS. CO. v. AYRES, Iowa, 82 N. W. Rep. 607.

78. MINES AND MINERALS—Quieting Title.—Though a void tax deed of mineral land is admissible to show that the grantee entered under a written instrument, in order to bring him within the provisions of Code Civ. Proc. § 323, declaring what constitutes adverse possession under a written instrument, it was harmless error to exclude it in an action brought by him to quiet title, where it was shown that he had not been in exclusive possession of the land during the requisite period.—SIMMONS v. MCARTHY, Cal., 60 Pac. Rep. 1037.

79. MORTGAGES — Deed—Absolute in Form.—Plaintiff executed to a creditor a deed, absolute on its face, to lands worth three times her debt, and received back a defeasance of even date, whereby the creditor agreed to released plaintiff of all personal liability on a previous mortgage, and to reconvey on payment of the debt within one year. Held, that the transaction was not a conditional sale, but a mortgage, from which

plaintiff might redeem.—MOONEY V. BYRNE, N. Y., 57 N. E. Rep. 163.

80. MORTGAGES — Extension — Discharge.—Where a wife executed a mortgage on trust property in which she had a life estate with remainder to her children to secure her husband's antecedent debt, and after her death the husband procured an extension of time without his children's consent, such extension discharged the mortgage by operation of law, though no administrator of the wife's estate or guardian of the children had been appointed, and there was no one to pay the debt.—FLEMING V. BARDEN, N. Car., 36 S. E. Rep. 17.

81. MORTGAGE—Foreclosure—Administrator De Bonis Non.—Where an administrator loans money of the estate on mortgage security, and dies, and the mortgagor conveys the land to a grantee, who assumes and agrees to pay the debt, the mortgagor has such an equity against the grantee, to compel him to pay the mortgage, as will justify a decree for an unpaid balance against the grantee in a suit by an administrator *de bonis non* against both, though there be no such privity of contract between the administrator *de bonis non* and the grantee as would sustain such decree.—REDFEARN V. CRAIG, S. Car., 35 S. E. Rep. 1024.

82. MORTGAGES—Receivers.—Under Civ. Code Prac. § 299, providing that, "in an action by a mortgagee for the sale of mortgaged property, a receiver may be appointed, if it appear that the property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to pay the mortgage debt," a junior mortgagee is entitled to subject the rents where a receiver is appointed upon his application, whether or not the appointment was declared to be for his benefit, though the action was brought by the senior mortgagee, and the land is insufficient to satisfy his debt.—NESBIT V. WOOD, Ky., 56 S. W. Rep. 714.

83. MUNICIPAL CORPORATIONS—Annexation—Liability for Injuries.—Laws 1894, ch. 356, § 4, providing that the city of B should not be liable for any debt, liability, or obligation of the town of F, which the act annexed to the city, incurred before annexation, but that the property in such town should remain liable, merely defines the area of taxation for such liabilities, and does not relieve the city from liability in a suit of one injured by the construction of a sewer by the town of F prior to the annexation.—HUFFMIRE V. CITY OF BROOKLYN, N. Y., 57 N. E. Rep. 176.

84. MUNICIPAL CORPORATION—Corporations—Stock.—The right of a city to purchase the stock of a corporation by virtue of authority of its ordinances and an act of the legislature, and to continue the existence of such corporation by placing part of the stock in the names of its officers, cannot be questioned in an action by the corporation to enforce a contract with a third party made prior to the purchase.—MONONGAHELA BRIDGE CO. V. PITTSBURGH & B. TRACTION CO., Penn., 46 Atl. Rep. 99.

85. MUNICIPAL CORPORATIONS — Loss by Fire—Liability of Municipality.—The power residing in a municipality to provide for a supply of water is, in its nature, legislative and governmental, and, if not exercised, and in consequence loss results to property owners by fires occurring, the municipality is not liable in damages.—PLANTERS' OIL MILL V. MONROE WATERWORKS & LIGHT CO., La., 27 South. Rep. 684.

86. MUNICIPAL CORPORATIONS—Ordinance—Trespass.—Rev. Ord. St. Louis, art. 17,188, § 981, provides that it shall be unlawful for any person without the consent of the owner or his agent to enter on any inclosed or improved real estate, lot, or parcel of ground in the city, or to deposit thereon or remove therefrom any substance, dirt, refuse, etc. Held, that under the ordinance one could not be held liable for a trespass committed within a building, since the provisions of the ordinance plainly showed that it applied to land, and not to buildings.—CITY OF ST. LOUIS V. BABCOCK, Mo., 56 S. W. Rep. 731.

87. MUNICIPAL CORPORATIONS—Ordinance—Unreasonable Interference with Individual Liberty.—A city ordinance declaring that it shall be unlawful for any woman to go in and out of a building where a saloon is kept for the sale of liquor, or "to frequent, loaf, or stand around said building within fifty feet thereof," and providing for the punishment of any saloon keeper who shall permit a violation of that provision of the ordinance, is void, as being an unreasonable interference with individual liberty.—GASTENAU V. COMMONWEALTH, Ky., 56 S. W. Rep. 705.

88. MUNICIPAL CORPORATIONS—Ordinance—Vagrants.—Under Rev. Ord. St. Louis, § 1062, defining a vagrant as one "who shall be found trespassing on the private premises of others and not give a good account of themselves," one could not be fined as a vagrant because found trespassing on the private premises of another if able to give a good account of himself.—CITY OF ST. LOUIS V. BABCOCK, Mo., 56 S. W. Rep. 732.

89. NEGLIGENCE—Rifle Club.—A rifle club is liable for injury to outside persons resulting from target practice on its premises.—SIMMONDS V. SOUTHERN RIFLE CLUB, La., 27 South. Rep. 656.

90. NEGLIGENCE OF MERCHANT—Permitting Floor to be Worn—Injury From Splinter.—The fact that a customer, in walking along the floor of defendant's storeroom, was injured by a splinter from the floor entering her foot through the shoe, is sufficient to authorize the submission to the jury of the question of defendant's negligence in permitting the floor to be in a dangerous condition.—RUSSELL V. STEWART DRY GOODS CO., Ky., 56 S. W. Rep. 707.

91. PARENT AND CHILD—Support of Stepchildren.—Where the stepfather has charge of the family, and the mother's children are provided for by both father and mother, there is no presumption that such support is gratuitous on his part.—EIKEN V. EIKEN, Minn., 82 N. W Rep. 667.

92. PAYMENT—Part Payment—Estoppel.—Where C, indebted to P for $3,249.54, secured by mortgage, negotiated a loan from W, to be secured by mortgage on the same property, to repay, *inter alia*, the debt due P and W, gave C a check payable to P for $1,254.71, marked, "In full claims against C," and P took and used this, and gave a receipt, not in full, but on account, P, not having noticed the words, "In full," and having made no agreement to take part payment in full satisfaction, is not estopped to assert priority of its mortgage as against W for balance of its debt.—GIRARD FIRE INS. CO. V. CANAN, Penn., 46 Atl. Rep. 115.

93. PRINCIPAL AND SURETY — Payment of Debt by Surety.—Where a debtor pledged policies of life insurance to secure several debts which he owed the pledgee, a surety who has paid one of the debts is not entitled to any part of the collateral security until all of the debts are paid, in the absence of an allegation that each of the debts was to receive its *pro rata* of the security.—WILLINGHAM V. OHIO VAL. BANKING & TRUST CO., Ky., 56 S. W. Rep. 706.

94. PROCESS—Corporations—Service.—Under Comp. Laws 1897, §§ 7056, 7066, permitting service of notice or process to be made on manufacturing corporations by serving the agent of the corporation having charge of its designated business office, a return on a summons which shows that the service was made on an agent, but does not state that it was the agent in charge of such office, does not confer jurisdiction on the justice.—TOLEDO ICE CO. V. MUNGER, Mich., 82 N. W. Rep. 663.

95. QUIETING TITLE — Decree—Collateral Attack.—Where the complaint, in an action to quiet title against a mortgagee, did not allege that the complainant was in possession of the mortgaged lands, or that they were vacant and unimproved, as required, but a decree was rendered in favor of the complainant, it will not be held invalid, for want of jurisdiction over the subject-matter when offered in evidence in a suit to foreclose such mortgage, as the court had jurisdiction to make such a decree, and an error therein could not be re-

viewed by a collateral attack.—FIGGE v. ROWLEN, Ill., 57 N. E. Rep. 195.

96. RAILROAD COMPANY—Bridges—"Public Road."—Though a railroad be a highway, it is not a public road, in the sense that the general public have the legal right to pass at will along its right of way. A bridge built by a railroad corporation on its line of way, over a navigable stream, is not open to travel over by the general public, though it may have been constructed in such a manner as to admit of the same.—OLIFF v. CITY OF SHREVEPORT, La., 27 South. Rep. 688.

97. RAILROAD COMPANY—Crossing—Contributory Negligence.—A pedestrian on a highway, who, in broad daylight, is struck by a car just as he steps on the railroad track crossing the highway, when the car was visible for a distance of 200 feet, from any point within 20 feet of the track, is barred from recovery by contributory negligence, though the track is a private siding.—FOX v. PENNSYLVANIA R. CO., Penn., 46 Atl. Rep. 106.

98. RAILROAD COMPANY—Farm Gates—Duty to Close.—It is the duty of the landowner for whose benefit and convenience gates are constructed and placed in a railroad right of way fence at a private farm crossing upon the land of such owner to keep such gates closed.—SWANSON v. CHICAGO, M. & ST. P. RY. CO., Minn., 82 N. W. Rep. 670.

99. RAILROAD COMPANY—Street Railroads—Injury to Child.—A charge of negligence against a street railroad company cannot be predicated on an unexplained accident to a child.—SMITH v. KANSAS CITY EL. RY. CO., Kan., 60 Pac. Rep. 1059.

100. RELEASE—Validity—Fraud — Rescission.—Where personal injuries have been suffered, for which a liability exists, and a release therefor has been fraudulently procured, an action for damages may be maintained without first obtaining a decree to rescind or to cancel the release; and the plaintiff is not precluded from attacking a release so obtained, when it is set up as a defense, because he has not restored or tendered back the amount received by him at the time the release was obtained.—MISSOURI PAC. RY. CO. v. GOODHOLM, Kan., 60 Pac. Rep. 1066.

101. RES JUDICATA—Judgment.—A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided.—BLAKE v. OHIO RIVER R. CO., W. Va., 35 S. E. Rep. 953.

102. SALE—Contract—Acceptance.—A written order, addressed to a party, and directing a shipment of goods, such order being "subject to approval at your office," is nothing more than a conditional offer to purchase. To become a valid enforceable contract, it must be approved or accepted by the party to whom it is addressed, and party signing the same must be notified of the approval or acceptance within a reasonable time.—REID v. NORTHWESTERN IMPLEMENT & WAGON CO., Minn., 82 N. W. Rep. 672.

103. SPECIFIC PERFORMANCE — Contract — Married Woman.—An oral contract by a married woman for the sale of her land cannot be specifically enforced under the doctrine of part performance.—ROSENOUR v. ROSENOUR, W. Va., 35 S. E. Rep. 918.

104. TAXATION—License—Bank Charter.—A provision in the charter of a bank exempting its "capital" from taxation does not cover an exemption from "license" taxation. The grant of a charter to a corporation, authorizing it to carry on a certain business during the term of its charter, does not import permission to do so without contributing to the support of the government in like manner with natural persons pursuing the same business.—STATE v. CITIZENS' BANK OF LOUISIANA, La., 27 South. Rep. 709.

105. TAX SALE — Purchase by State.—Where lands have been sold for taxes, and bid in for the State, and the State subsequently assigns all rights and interests acquired by it under such sale to an individual, who thereafter perfects the title thereunder, the State cannot impeach or impair such title by a resale of the lands for taxes due and unpaid for prior years.—STATE v. CAMP, Minn., 82 N. W. Rep. 645.

106 TRESPASS—Mesne Profits — Damages.—In an action of trespass for mesne profits, if the defendant at the time of the inception of the cause of action had knowledge of the plaintiff's title, although he honestly believed that he held the superior legal title, the measure of damages is not the actual receipts, but is the fair annual rental of the property, with legal interest, less the taxes paid by the defendant.—BODKIN v. ARNOLD, W. Va., 35 S. E. Rep. 980.

107. TRUSTEES—Ratification of Acts—Estoppel.—The beneficiaries under a will, having, when competent to do so, ratified the acts of the trustee and administrator in investing the funds outside the State, and in paying the principal to one to whom was bequeathed only the income for life, which principal was used for their as well as her support, are estopped to object to his account because of such acts of his.—IN RE ARMITAGE'S ESTATE, Penn., 46 Atl. Rep. 117.

108. TRUSTS—Receivers — Title to Assets.—A receiver of the property of a resident of the State of Illinois, appointed in a creditors' suit pending in that State, to whom all the property of the debtor, real, personal, and mixed, is transferred by order of the court, acquires thereby title, and the right to recover upon a debt due to the debtor from a resident of the State of Wisconsin. The *situs* of such debt is at the domicile of the creditor.—GILBERT v. HEWETSON, Minn., 82 N. W. Rep. 633.

109. USURY—Evidence—Payment of Commission to Agent.—Evidence of payment of a commission by a borrower to the agent of a money lender for his services in obtaining a loan from his principal, and upon which the agent becomes a surety and procures another to become surety, in order to obtain the loan which he is employed by the borrower to negotiate, is not sufficient to show the transaction usurious, where the effect of usury is the forfeiture of both principal and interest.—LEONHARD v. FLOOD, Ark., 56 S. W. Rep. 781.

110. VENDOR AND PURCHASER—Sale of Land—Married Woman's Contract.—The executory contract of a married woman for the sale of land is unenforceable. Though an unenforceable executory contract of a married woman recited the payment of the price, the purchaser is not entitled to a lien on the land therefor, in the absence of competent proof that he made the payment; the fact of payment being put in issue.—GRAHAM v. GRAHAM, Ky., 56 S. W. Rep. 708.

111. WAREHOUSEMEN — Wheat Receipts.—The requirements of section 4, ch. 148, Gen. Laws 1895, providing for a recovery of one cent per bushel for the withholding of wheat from any person having a storage receipt, after demand, must be considered as penal in character; and it must be held to require a strict compliance with all its terms and conditions, to set the statute in motion.—FERCH v. VICTORIA ELEVATOR CO., Minn., 82 N. W. Rep. 678.

112. WILL—Bequest — Charitable Uses.—A bequest in a will for the erection of a memorial window to another in a church, left in trust to trustees who are themselves to fix the amount to be so expended,—the will naming no amount to be thus disbursed,—is not a valid testamentary disposition.—SUCCESSION OF MCCLOSKEY, La., 27 South. Rep. 705.

113. WILL — Charitable Institutions.—A bequest to a school of learning having an academic, collegiate, and theological department open to all of good moral character, there being no charge for instruction in theological department, and the institution being supported largely by public and private charity, and devoting all its resources to increasing its benefit to the public, is a bequest to a charitable institution.—ALFRED UNIVERSITY v. HANCOCK, N. J., 46 Atl. Rep. 178.